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SHOULD WE BID A FOND FAREWELL TO THE LEGAL TRANSPLANTS 'THEORY? THE THEORY OF LEGAL POLLINATION THROUGH THE LENS OF A LEGAL SLEEPING BEAUTY (MEDIATION)[1]

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Abstract: The intrepid Portuguese sailor Jorge Álvares led the maritime convoy towards the uncharted Far East aimed at establishing trade relations with the Imperial China in 1514. In so doing, he marked the first encounter between glaringly different civilizations and starkly different cultural backgrounds/legal cultures. This can be hailed as the inception of a bedazzling *legal dualism*, which has traversed centuries of Macau legal history and still ripples forward.

Fast forward to the nineteenth century, the Portuguese – further the decaying of the Qin dynasty – seized the opportunity to exert control over Macau while imposing their own laws and wiping out Chinese laws in the process. Like they were never able to do before. A plethora of changes took place thereafter. Leveraging on the «new illuminist winds», which were sweeping across all Europe and beyond, Portugal inscribed in its Constitution that Macau was part of

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the United Kingdom of Portugal, Brazil and the Algarves (*Reino Unido de Portugal, Brasil e dos Algarves*) (pursuant art. º 20/III of Portuguese Constitution of 1820). Such an historical event marked the outset of a movement of *legal pollination*, which would overhaul Macau´s legal landscape forever.

Consistent with the overarching idea of Macau-as-a-part-of-Portugal, the Portuguese Penal Code of 1852, the Civil Code of 1867, the Civil Procedure Code of 1876 and the Commercial Code of 1888, have been *extended* to Macau. Such a batch of drastic changes inflicted upon Macau´s legal landscape sparked the outset of Portuguese «colonial/legal domination» and prompted both the emergence of *legal dormants* (as Chinese laws were swept aside) and *cultural divergence with law* (as both the Confucian normative system («Rites») and Chinese customary mediation were slowly submerged by the ceaseless stream of Portuguese bodies of laws) accordingly. To this day, they both stand as *sleeping legal beauties* in the remit of Macau´s legal landscape.

Against this background, this paper seeks to demonstrate that the current legal landscape in Macau (mirrored on the prominence of court adjudication over amicable means of solving disputes, a hallmark of Chinese legal culture) can be traced back to the botched/watered down legal pollination undertaken by the Portuguese back in the nineteenth century. This paper accordingly challenges the validity of the legal transplants´ theory.

Keywords: Macau; China; Portugal; Confucianism; Legal Dualism; Legal Transplants; Legal Dormants; Cultural Divergence with Law; Legal Pollination.

1. INTRODUCTION

Legal cultures vary widely as a result of differing cultural[2] and legal traditions[3]. This axiom is hardly startling as culture[4] is one of the most important social sub-sys-

2 See: Hugo Luz dos Santos, A Prospective Court-Connected Mandatory Mediation Regime in Macau: A Brief Note, in: Peter Chi Hin Chan/C. H. van Rhee (Editors), Civil Case Management in the Twenty-First Century: Court Structures Still Matter, Beijing/Singapore, Springer Nature, (2021): 199-204.

3 See in Chinese language: Leong Cheng Hang/Hugo Luz dos Santos, 梁靜姮，雨果：第七章 葡萄牙衛生基本法，《部分國家衛生基本法研究》，法律出版社，Beijing, Law Press China, 2018年版，第115頁至第127頁. In Spanish language: Hugo Luz dos Santos, Plan para una posible *mediación* pre-procesal judicial obligatoria con una fácil opción de exclusión voluntaria en Macao, in: *Revista de mediación*, Volume 14, N.º 2, (2021): 34-40; in Portuguese language: Hugo Luz dos Santos, "O acesso ao direito e aos tribunais em processo civil", in: *Cadernos de Direito Privado*, n.º 75, julho-setembro 2021, (2021): 13-29.

4 Geert Hofstede, "Cultural constraints in management theories", *The Academy Management Executives*, 7 (1), (1993): 82-93. Geert Hofstede, "Masculine and feminine cultures", A. F. Kazdin (Editor.), *Encyclopaedia of psychology*, Washington, DC, American Psychological Association, (2000): 113-118 and passim. Geert Hofstede, *Cultures and organizations: Software of the mind*, New York, NY: McGraw Hill, (1991): passim. G.H. Hofstede/M. H. Bond, "The Confucius connection: From cultural roots to economic growth", *Organizational Dynamics*, 16, (1988): 5-20. Geert Hofstede, *Culture´s consequences: Comparing values, behaviours, institutions, and organisations across nations*, 2nd edition, Thousand Oaks, CA: Sage, (2001): 18 ff. Geert Hofstede, *Culture´s consequences: International differences in work-related values*, London, United Kingdom, Sage, (1980): 17 ff (this literature focuses on the importance of cultural variations of members of different cultural backgrounds working in enterprises and organizations across several nations). See M. J. Gelfand/H.C. Triandis/D.K.S. Chan, "Individualism versus collectivism or versus authoritarianism", *European Journal of Social Psychology*, (2006): 398-410 (drawing upon the dichotomy individualism versus collectivism carved out by Geert Hofstede).

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tems[5]. It follows that it should not amount to a baffling statement that parsing a given legal culture equates to canvassing its foundations in the vast swathes of legal history[6]. As a result, one should not be flabbergasted to learn that culture is tightly interlocked with the development[7] of a legal culture[8].

Legal culture is not only mirrored on a host of historical traditions[9] though[10]. Rather, legal culture is also mirrored on both a bevy of judicial[11] practices[12] and the public[13] per-

5 For a nuanced and fine-grained account on Luhmann´s social systems, in English language: Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation (Against the Background of a Narrative of Social Sub-systems in Everlasting Cross-Fertilization)*, Singapore/Beijing/Berlin/New York, Springer Nature, (2023): 1-217, which I will follow closely in this regard.

6 In German doctrine: Dieter Heinrich, *Hegel im Kontext*, Frankfurt am Main, Suhrkamp, 2010, *passim*.

7 In Italian doctrine: Maria Bruna Chito, *Codice Civile, a cura di Pietro Rescigno con il coordinamento di G.P. Cirillo - V. Cuffaro - Roselli*. X edizione, Tomo I, 7.ª ed. Milano, Giuffrè Editore, (2008): passim.

8 Lawrence M. Friedman, "Is there a Modern Legal Culture?", *Ratio Juris*, 7 (2) (1994): 118 ff (legal culture amounts to a set of ideas, values, attitudes, and opinions that people in some society hold with regard to law and the legal system).

9 Historical tradition – hence: legal tradition - go hand in hand with both the cultural and religious influence regarding legal debt collection. See in Swiss French-speaking doctrine: Bernard Piettre and François Vouga, *La dette. Enquête philosophique, théologique et biblique sur un mécanisme paradoxal*, Genève, Labor et fides, (2015): *passim.* In German doctrine, on the tandem between theology, philosophy, natural law and restitution, Nils Jansen, *Theologie, Philosophie und Jurisprudenz in der Spat scholastischen Lehre von der Restitution. Außervertragliche* Ausgleichsansprüche *im frühneuzeitlichen Naturrechtsdiskurs*, Tübingen, Mohr Siebeck, (2013): *passim*. In the same vein, in Italian doctrine: Arrigo Diego Manfredini, *Rimetti a noi i nostri debiti. Forme della remissione del debito dall'antichità all'esperienza europea contemporanea*, Bologna, Il Mulino, (2013): *passim*. The influence of law and religion (concretely, Christianity) on a given legal framework is being hotly discussed by scholars. Such debate rests upon a simple question: a debt forgiveness to the poor is based on moral grounds, cultural, moral, or religious ones? «Debt forgiveness is at the heart of the gospel message. The Lord sent His Son to redeem the debts of the world created by Adam and Eve and that were transmitted to subsequent generations of humanity. The New Testament restored older biblical ideas of debt relief, such as the Jubilee. The Lord's Prayer begs God to forgive the pious their debts, as they also forgive their debtors (Mt 6:12). Yet what, if anything, does that mean for legal practice? Is there a Christian mode of debt collection and enforcing contractual promises? Should Christian creditors refrain from exercising their rights?» See: Wim Decok, Law, "Religion and Debt Relief: Balancing above the "Abyss of Despair" in Early Modern Canon Law and Theology", *The American Journal of Legal History*, 57 (2017): 125–141.

10 Franz Wieacker, "Foundations of European Legal Culture", *The American Journal of Comparative Law*, 38 (1989): 1 ff (on the foundations of legal culture).

11 See in French doctrine: François Terré/Philippe Simler/Yves Lequette/François Chénedé, *Droit civil; les obligations*, 12e édition, Paris, Dalloz, 2018, pp. 1-2036.

12 Converging: Yulin Fu/Zhixun Cao, *The Position of Judges in Civil Litigation in Transnational China-Judicial Mediation and Case Management in Towards a Chinese Civil Code*, L. Chen/C. H. van Rhee (Editors), Leiden/Boston, Martinus Nijhoff Publishers, (2012).

13 Nancy Welsh/Bobbi McAdoo/Donna Stienstra, "The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions", Tania Sourdin/Archie Zariski (Eds.), *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution*, Eagan, Minnesota, Thomson Reuters, (2013): (noting that when citizens feel they have had a fair treatment – in judicial settlements – they tend to yield perceptions of fairness and increase the levels of satisfaction with the administration of justice).

ception[14] of a given legal[15] system[16]. Taken together, both amount to the cultural matrix of a given jurisdiction[17], which forms part of a broader legal apparatus.

For that very reason, culture is tightly interlocked to tradition. Tradition[18] has been defined as a set of rules of empirical analysis, a symbol of rational meaning that has travelled all the way from the past[19], which is wholly shaped by deep-seated habits that are amenable to be relayed from generation[20] to generation[21]. In this vein, legal

14 Rebecca Hollander-Blumoff/Tom R. Tyler, "Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution", *Journal of Dispute Resolution*, 1 (2011): 1 ff (noting that procedural justice is closely linked to perceptions of legitimacy); Tom R. Tyler, *Why People Obey the Law*, New Jersey, United States of America, Princeton University Press; Revised ed. edition (March 2006), (2006): 1-320 (92-110) (Tom R. Tyler suggests that lawmakers and «*law enforcers would do much better to make legal systems worthy of respect than to try to instil fear of punishment. He finds that people obey law primarily because they believe in respecting legitimate authority*») (italics added); Edgar Allan Lind/Tom R. Tyler, *The Social Psychology of Procedural Justice*, New York, Springer, (1988): 208 ff. (emphasizing that the perceptions of justice are of paramount importance as to enhance citizens' perception of provider legitimacy).

15 Tom R. Tyler, *Why people cooperate: The role of social motivations*, Princeton, New Jersey, Princeton University Press, (2011) (the author establishes a parallelism between underlying social motivations – such as trust and perceived legitimacy - to engage in cooperation with the authorities).

16 Lawrence M. Friedman, *The Legal System: A Social Science Perspective,* New York, Russell Sage Foundation; First Edition (US) First Printing edition (August 1, 1975), (1975): passim. One should not confound legal culture with my concept of *positive legal-real-feel* and *negative legal-real- feel* within the meta-concept of *legal sentiment* inserted at the third pillar of four-tiered model of dispute resolution (*legal dynamics of dispute resolution*).

17 See in Spanish doctrine: Na doutrina espanhola: Alfonso-Luis Calvo Caravaca/Javier Carrascosa González, *Derecho Internacional Privado*, Vol. II, 18ª edição, 2018, Granada.

18 Leong Cheng Hang, "Macao's Marital Property System: A Chronicle of the Road to Successful Autonomy", Mozambique, Faculty of Law of the University of Maputo, (2019): 3 ff and passim, whose research I have followed closely in this regard.

19 A corollary of the well-known German doctrine of both *Fernrecht und Das Prinzip Verantwortung*: Hans Jonas, *Das Prinzip Verantwortung: Versuch einer Ethik für die technologische Zivilisation*, Frankfurt am Main, Suhrkamp Verlag, (1979): 47-49.

20 See: John Rawls, *A Theory of Justice*, 2nd edition, Cambridge, United States of America, Belknap Press: An Imprint of Harvard University Press, (1999): 1-540 («Rawls aims to express an essential part of the common core of the *democratic tradition-justice as fairness*-and to provide an alternative to utilitarianism, which had dominated the Anglo-Saxon tradition of political thought since the nineteenth century. Rawls substitutes the ideal of the social contract as a more satisfactory account of the basic rights and liberties of citizens as free and equal persons. "Each person," writes Rawls, "possesses an inviolability founded on justice that even the welfare of society as a whole cannot override»); John Rawls, *Political Liberalism*, Expanded version, Columbia Classics of Philosophy, New York City, Columbia University Press, (2005): 1-525 (This book continues and revises the ideas of justice as fairness that John Rawls presented in *A Theory of Justice* but changes its philosophical interpretation in a fundamental way. «That previous work assumed what Rawls calls a "well-ordered society," one that is stable and relatively homogeneous in its basic moral beliefs and in which there is broad agreement about what constitutes the good life. Yet in modern democratic society a plurality of incompatible and irreconcilable doctrines—religious, philosophical, and moral—coexist within the framework of democratic institutions. Recognizing this as a permanent condition of democracy, Rawls asks how a stable and just society of free and equal citizens can live in concord when divided by reasonable but incompatible doctrines?»).

21 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition,* Cambridge, Massachusetts, Harvard University Press, (1983): 549 and ff and passim, whose research I have followed closely in this regard.

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tradition is deeply woven into the fabric of legal culture[22]/[23]. Rule of Law[24] – a beacon of natural justice[25] – embodies a comprehensive and full-fledged legal tradition that must be left to develop of its own accord nonetheless[26]. Which is firmly rooted in the fact that it behoves to jurisdictions to squarely align extant/enacted bodies of laws to their underlying social reality. A truism that the former Portuguese rulers that undertook legal transplants in Macau back in the nineteenth century were clearly oblivious of. More on this further down in this paper[27].

22 *Id.*

23 Geoffrey J. Martin, *All Possible Worlds: A History of Geographical Ideas*, Cheng Yinong and Wang Xuemei (translation), Shanghai Century Publishing House, (2008): 249 ff and passim. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition, cit*, passim. Leong Cheng Hang, "Macao's Marital Property System: A Chronicle of the Road to Successful Autonomy", *cit.*, passim.

24 Dylan Dino, "The Rule of Law and the Rule of Empire: A. V. Dicey in Imperial Context", *The Modern Law Review*, 81 (5) (2018): 739-764 (739-741) (noting that «*the idea of the rule of law, more ubiquitous globally than ever before*, owes a lasting debt to the work of Victorian legal theorist A.V. Dicey (…) To Dicey we owe not only the phrase "the rule of law" but also one of the most influential expositions. Dicey´s account of the rule of law emphasised three elements: first, government through legal norms and procedures rather than unrestrained discretion; second, formal equality before the law; and third, the establishment of individual rights through gradual, bottom-up (common-law) development»); T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and the Common Law*, Oxford, Oxford University Press, (2013), Chapter 3; J.W.F. Allison, "Turning the Rule of Law into an English Constitutional Idea´", C. May/A. Winchester (Ed.), *The Edward Elgar Handbook on the Rule of Law*, Cheltenham, Edward Elgar Publishing, (2018): passim (giving nuanced accounts of Dicey´s groundbreaking work and originality when it comes to Rule of Law); John Gardner, *Law as a Leap of Faith*, Oxford, Oxford University Press, (2014): 1-328 (in this book Professor John Gardner «*collects, revisits, and supplements fifteen years of celebrated writings on general questions about rule of law, law, and legal systems* - writings in which he attempts, without loss of philosophical finesse or insight, to cut through some of the technicalities with which the subject has become encrusted in the late twentieth century»).

25 The principle of natural justice is intrinsically woven with natural law, whose foundations were laid down by Hugo Grotius and Leibniz and later embraced by John Finnis. See, respectively, Hugo Grotius, Le droit de la guerre et de la paix, II, cap. XVII, I, Paris, Presses Universitaires de France (2nd edition of 2012) (1625: 1st edition): 1-894 (passim) (this renowned author argues that the human community (and law) is (are) undergirded by the human reason as opposed to the mercurial and whimsical instinct. Such a stance is squarely aligned with an agreed-upon Latin maxim, which reads as follows: Ius naturale est dictatum rectae rationis). In Latin language: Gottfried Wilhelm Leibniz, Nova methodus discendae docendaeque jurisprudentiae (The New Method of Learning and Teaching Jurisprudence According to the Principles of the Didactic Art Premised on the General Part and in the Light of Experience: A Translation of the 1667 Frankfurt Edition with Notes by Carmelo Massimo de Iuliis), Ringwood, Hampshire, United Kingdom, Talbot Publishing, (2017): 1-213. John Finnis, Natural Law and Natural Rights, 2nd edition, Oxford, Oxford University Press, (2011): 1 ff and passim (contends that is necessary to identify the host of reasons that favour having law – or a universe of regulations commensurate with it - from the «first-person perspective of practical reason»).

26 Although further utterances on the fabric of Rule of Law fall well outside the scope and breadth of this paper, one must not lose sight of the fact that the thrust to Deglobalizing Rule of Law is underway. See: Mauro Bussani, "Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law", *The American Journal of Comparative Law*, 67 (2019): 701-744 (701) (contending that the thrust to Deglobalizing Rule of Law is interwoven with thrust to take heed of «*well-known differences that run through cultures and traditions*». In spite of which, «the West has never stopped trying to export its own law into the rest of the world»). Italics added. Unsurprisingly, there have been educated calls to take heed of the pinpointed cultural and legal differences by, in the case of China, allow for a «Socialist Rule of Law». See: Chinese Common Law Guiding Cases, *Harvard Law Review*, 129 (2016): 2213.

27 See point 4. to point 5.2. of this paper.

Whilst the existence of cultural differences across nations and continents has been widely documented[28] and debated[29], there is a perceived dearth of legal research on the frailties/drawbacks laid bare by the shoddy, botched and watered-down legal transplants undertaken by the Portuguese back in the nineteenth century in Macau. With this backdrop in mind, no surprise stems from the fact that opportunities for costly missteps abound[30].

This paper proceeds as follows. Part 2 skeletally sketches out the methodology underpins this paper. Part 3 features topics that fall outside the purview of this paper. Part 4 pores over Macau´s legal history spanning four centuries against the background of which a fine-grained analysis on the mesmerizing *two-layered law and social reality* is carried out. Part 5 throws light on the dazzling *two-layered cultural originalism* that still ripples forward. In Part 6 light will be cast upon the theory of legal transplants while avowedly underlining that its quintessence is utterly inapplicable to a hybrid jurisdiction like Macau. In Part 7 a bevy of concluding remarks that capture the gist of this paper will be made.

2. RESEARCH METHODOLOGY

2.1. The importance of the uses of history to premise the assertions made throughout the paper: Between a law-in-context methodology and originalism (st) methodology[31]

If one strives to grasp the gist of a given legal framework, a *law-in-context methodology* is not only necessary but indispensable. This entails delving (excavating[32]) into

28 See Jonathan Matusitz/George Musambira, "Power Distance, Uncertainty Avoidance, and Technology: Analysing Hofstede´s Dimensions and Human Development Indicators", *Journal of Technology in Human Services*, (2013): 43 ff and passim (parsing two of the most iconic Hofstede´s Dimensions of power distance and uncertainty avoidance).

29 Sasha Abramsky, *Jumping at Shadows: The Triumph of Fear at the End of the America Dream*, Bold Type Books, (2017): 28 ff (noting that profound cultural differences prompt society cleavages, which can hamper the so-called American dream).

30 About this see: Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation (Against the Background of a Narrative of Social Sub-systems in Everlasting Cross-Fertilization)*, Singapore/Beijing/Berlin/New York, Springer Nature, (2023): 1-217 (passim).

31 Written by Professor Dongjuan Lyu (Faculty of Law, City University of Macau).

32 Edward J. Eberle, "The Method and Role of Comparative Law", *Washington University Global Studies Law Review*, 8 (3) (2009): 452 (noting that «we need to excavate the underlying structure to understand better what the law really is and how it really functions within a society»). See also, Rodolfo Sacco, "Legal formants: A dynamic approach to comparative law: discovering and decoding invisible powers", *The American Journal of Comparative Law*, (1991): 343-385 (echoing the same views).

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the *origins* of a given legal framework[33]. History is bound to play a starring role in this regard[34]. So does Originalism[35]/[36]/[37].

33 Rodolfo Sacco, "Diversity and Uniformity in the Law", *The American Journal of Comparative Law*, 49 (2001): 172 (arguing that «law is not independent, nor separated from other social phenomena. In addition to law, language, knowledge, and the quality of human endeavour (material objects ans intellectual creations) together constitute human culture»).

34 The relevance of originalism (suitably tailored to my research purposes) and the uses of history could not be clearer in this regard: «*the way people imagine history*, *look for things in history*, deem historical evidence relevant or salient, and weigh competing *historical claims will depend on their background modes of justification.* For each different theory or style of legal argument, there will be a *corresponding way to use history to support that argument*. There will be also a corresponding lens or filter through which people perceive and interpret the significance and relevance of historical events»; (italics added); Jack M. Balkin, "New Originalism and the Uses of History", *Fordham Law Review*, 82 (2013): 665.

35 Jack M. Balkin, "New Originalism and the Uses of History", *cit.,* 652 (History is being held dear by acclaimed academic circles. Here is why: «*history is a resource, not a command*. It is resource in three senses. First, lawyers use of history to support arguments from each and every modality of argument. Rather than a distinct mode of argument, history is a resource for making arguments within each modality. Second, *how history is used and how it becomes relevant depends on each modality´s underlying theory of justification*. *Third, historical arguments within each modality are always defeasible given sufficiently powerful countervailing considerations*» (italics added).

36 I will use the term *originalism* to express a interchangeably a *cultural originalism* or an *original cultural meaning* (as opposed to *original semantic meaning* of a Constitution or a given law). «The semantic meaning of a word or phrase is its dictionary definition or to definitions that arc in common us among the population; hence «*original semantic meaning*» refers to dictionary definitions or to definitions in common us at the time of adoption»; (italics added) Jack M. Balkin, "Must We Be Faithful to Original Meaning?", *Jerusalem Review Legal Study*, (7) (2013): 57-77; Jack M. Balkin, "The New Originalism and the Uses of History"*, Fordham Law Review*, 82 (2013): 641-646. *Original cultural meaning* is not easy to ascertain as grasping its *original cultural meaning* depends on the context (social, philosophical, cultural) in which it has been etched. Hence the *law-in-context* methodology used throughout this paper; See on Originalism: Jack N. Rakovc, "Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism"*, San Diego Law Review*, (4), (2011): 575 ff («It is one thing, after all, to suppose that words fraught with political content retain a relatively fixed meaning in 4uiet times, hut it is quite another to apply that assumption to a period like the late 17XOs or the Revolutionary era more generally.»); *id.* at 593 («The adopters of the Constitution inhabited a world that was actively concerned with ... the instability of linguistic meanings, and ... arguments about the definitions of key words and concepts were themselves central elements of political data»). See: Saul Cornell, "Conflict, Consensus & Constitutional Meaning: The Enduring legacy of Charles Beard", *Constitutional Commentary*. 3 (2014): 405 («Given the contentious nature of Founding era legal culture it seems unreasonable to assume that one can identify a single set of assumptions and practices from which to construct an ideal reasonable reader who could serve as model for how to understand the Constitution in 17XX.»)»; textually, Jack M. Balkin, *The Construction of Public Original Meaning. Constitutional Commentary*. Minnesota, University of Minnesota Law School, 26 (2016): 78.

37 Acclaimed North American doctrine often criticizes the Supreme Court of the United States of America and the Court of Appeals, respectively, for paying little to none attention at all to the scrutiny of original public meaning of the United States of America Constitution. Examples of this to be frowned-upon trend are: Arizona v. United States, 132 S. Ct. 2492 (2012); Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012); Medellín v. Texas, 552 U.S. 491 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Breard v. Greene, 523 U.S. 371 (1998); Regan v. Wald, 468 U.S. 222 (1984); Dames & Moore v. Regan, 453 U.S. 654 (1981); Haig v. Agee, 453 U.S. 280 (1981); DeCanas v. Bica, 424 U.S. 351 (1976); Zschernig v. Miller, 389 U.S. 429 (1968); Zemel v. Rusk, 381 U.S. 1 (1965); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Perez v. Brownwell, 356 U.S. 44 (1958); United States

There is a fairly good academic reason for the use of law-in-context methodology in this regard: this paper is aimed at *understanding in retrospect*[38] the *legal dualism*[39] created by the Portuguese back in the nineteenth century.

A law-in-context methodology aims to unlock such a set of *original reasons* and bring them into light[40] with a view to support my central claim according to which social sub-systems[41] (namely, law and the social reality) have interacted with each other on a permanent basis for a long-winded amount of time in the tiny – yet dazzling – peninsula of Macau. Proving that the foregoing social sub-systems have permanently interacted with each other throughout the vast swathes of history would be utterly untenable devoid of, and decoupled from, an in-depth law-in-context methodology[42] premised on the adroit uses of history.

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v. Caltex (Phil.), Inc., 344 U.S. 149 (1952); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); MacKenzie v. Hare, 239 U.S. 299 (1915); Juragua Iron Co. v. United States, 212 U.S. 297 (1909); Neely v. Henkel, 180 U.S. 109 (1901); The Paquete Habana, 175 U.S. 677 (1900); Fong Yue Ting v. United States, 149 U.S. 698 (1893); In re Ross, 140 U.S. 453 (1891); Jones v. United States, 137 U.S. 202 (1890); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Ker v. Illinois, 119 U.S. 436 (1886); Fleming v. Page, 50 U.S. (9 How.) 603 (1850). See: Andrew Kent, "The New Originalism and the Foreign Affairs Constitution", *Fordham Law Review*, 82 (2) (2013): 757-758. Antithetically, US Supreme Court´s decision delivered on *Heller* 554 U.S. 570 (2008) constitutes a fine example of the pursuit for Originalism, which has merited the applause of renowned doctrine. See: Jamal Greene, "Selling Originalism", *Georgetown Law Journal* 97 (2009): 657-659 (arguing that Heller constitutes "the most thoroughgoing originalist opinion in the Court's history").

38 Jack M. Balkin, *Living Originalism*, Cambridge, Belknap Press: An Imprint of Harvard University Press, (2011): passim (putting forth a new concept of framework originalism in which both constitutional lawyers and laypeople should be truly faithful to the original meaning of the Constitution). See also: Jack M. Balkin, "New Originalism and the Uses of History", *Fordham Law Review*, *cit.*, *passim*.

39 One of the most emphatic accounts of that *legal dualism* (with which I fully agree to the extent that captures to picture of a bifurcation between Chinese laws and Portuguese laws since ancient times) can be found in an academic paper published in Hong Kong Journal which reads as follows: «*A dualism has been shown in all aspects of life*: in the exercise of political power, *the administration of justice*, religious structures, trade affairs, even the urban administration»; R. Pereira Alfonso, "The Political Status and Government Institutions of Macau", *Hong Kong Law Journal*, 16 (1) (1986): 28-48.

40 Peter Mascini, "Responses of Law and Economics to the Threat of Its Initial Success", *Comparative Law, Law and Method*, November 2018, (2018): 15 («the concept of the decision maker as enculturated actor is far removed from the assumption of the decision maker as rational actor. Rather, it assumes that *preferences are flexible, incoherent, and embedded in a social and cultural context*» (italics added).

41 For a nuanced and fine-grained account on Luhmann´s social systems: Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation (Against the Background of a Narrative of Social Sub-systems in Everlasting Cross-Fertilization)*, Singapore/Beijing/Berlin/New York, Springer Nature, 2023, passim, which I will follow closely in this regard.

42 Mark Van Hoecke, "Methodology of Comparative Legal Research", *Law and Method*, (2018): 17 (referring to the need to «putting *law-in-context* aims at *understanding* the law, as a foreigner to that legal system and, hence, *explaining* why the law is as it is. Inevitably, this *implies empirical observation*». When it comes to the *law-in-context* methodology, this renowned scholar stated that «*a historical study will inevitably also use sociological, economic, psychological, and/or other context data. In this way it may encompass, on occasion, a full law-in-context approach*») (italics added).

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2.1.2. An interdisciplinary methodology: The importance of an evidence-informed law and the rules of inference to bolster the creation of new doctrinal concepts[43]

To add plausibility to the newly-crafted doctrinal concepts set forth in this paper (v.g. *two-layered law and social reality*[44] and *two-layered cultural originalism*[45] that surpass the hackneyed concept of legal dualism), an interdisciplinary[46] methodology[47] will be used.

The evidence-informed law[48] (as opposed to mere hunches[49]) - coupled with brawny and robust rules of inference[50] - will prove invaluable to premise the claims made throughout this paper.

43 Written by Professor Dongjuan Lyu (Faculty of Law, City University of Macau).

44 See: Point 4. to point 4.1.1.6.1. of this paper.

45 See: Point 5. to point 5.2. of this paper.

46 Jacqueline N. Font-Guzmán, "Programa de Derivación en Puerto Rico desde la Perspectiva de la Mediación", *Contemporary Tendencies in Mediation*, Humberto Dalla Bernardina de Pinho/Juliana Loss de Andrade (Editors), Madrid, Editorial Dykinson, (2015): 31-32 (in a similar vein, in Porto Rican doctrine (Spanish language) has lavished praised on the multidisciplinary approach in the realm of mediation as follows: «Mis experiencias a través de los años me han convencido de la necesidad de adoptar modelos interdisciplinarios en el desarrollo y la implementación de programas de métodos alternos de resolución de conflictos»).

47 Bart van Klink/Sanne Taekema, *Law and Method: Interdisciplinary Research into Law*, Tübingen, Mohr Siebeck, (2011): 1 ff («The disciplines are classified in broadly three categories: empirical social science (sociology, economics, psychology), humanities (history, political theory, ethics, philosophy), and language-oriented disciplines (rhetoric, law and literature, argumentation theory)»). I will follow this taxonomy throughout the paper with the accompanying limitations of an academic lawyer entering those boundless (yet cognitively distant) epistemologist hemispheres though.

48 Tom Tyler, "Methodology in Legal Research", *Utrecht Law Review*, 13 (3), (2017): 130-131 (I will avowedly embrace an *evidence informed law* approach. Here is why: «Empirical models have become increasingly popular with the increasing availability of large data sets and the growth in familiarity both with quantitative regression models and qualitative methods for research. *Empirical research has value and it is much better to base policy on evidence than on hunches*. *In this article it is suggested that the benefits of an empirical approach are enhanced not simply by the use of data, but in particular by drawing upon the power of social science theories*. A number of social science theories might potentially be relevant. Because my own background is in psychology, I focus on psychological theories. These theories allow the law to expand the framework within which issues of law are considered. It is in drawing upon theoretically based social science models of human nature that the law has been especially weak and has a great deal to gain, *and not just in the widespread use of research instead of intuition, hunch and supposition*» (italics added).

49 Tom Tyler, "Methodology in Legal Research", *cit.*: 130-131 («A number of social science theories might potentially be relevant. Because my own background is in psychology, I focus on psychological theories. These theories allow the law to expand the framework within which issues of law are considered. It is in drawing upon theoretically based social science models of human nature that the law has been especially weak and has a great deal to gain, *and not just in the widespread use of research instead of intuition, hunch and supposition*» (italics added).

50 Lee Epstein/Gary King, "The Rules of Inference", *University of Chicago Law Review*, 69 (1) (2002): 19 ff and passim (the workability of rules of inference – from either data collated directly or indirectly by the researcher – relies upon, and entails: **(i)** amassing data; **ii)** summarizing data; **iii)** making descriptive, qualitative and causal inferences from the batches of data analysed). The paper is to rely upon the rules of inference´s methodology

3. MATTERS AND SUBJECTS THAT FALL OUTSIDE THE BREADTH AND SCOPE OF THIS PAPER[51]

This paper aims not to do a comparative law research. The rationale behind the choice of each of the analysed jurisdictions (Macau and Portugal) is related with the thrust to support the claims made throughout the paper drawing upon the selected jurisdictions. Not with a thrust to make a comparative law research drawing upon the selected jurisdictions. The paper aims not to compare legal systems[52]. For that reason, neither a *macro level* comparative analysis nor a *micro level* comparative analysis[53] will be used in this paper.

4. SETTING THE STAGE: THE INCEPTION OF A TWO-LAYERED LAW AND SOCIAL REALITY IN MACAU

4.1. West meets East. Macau as a stage for an exquisite encounter between different civilizations and different cultural backgrounds (1513-1573): The era of the flourishing trade in the Far East

Macau is a mesmerizing place. One is sure that this thought must have crossed Portuguese sailors´ minds as they set foot on this tiny Peninsula as far back as 1513. The crave to ferret out uncharted territories was the overriding goal.

To cater for that, the intrepid Portuguese sailor Jorge Álvares has led the maritime convoy towards the uncharted Far East aimed at establishing trade relations with the Imperial China[54]. In doing so, he marked the first encounter between glaringly diffe-

with a view to withdrawing some conclusions and inferences from the handful of bodies of empirical research reviewed throughout the paper.

51 Written by Professor Dongjuan Lyu (Faculty of Law, City University of Macau).

52 Mauro Bussani/Ugo Mattei, "Diapositives versus Movies – The Inner Dynamics of the Law", *The Cambridge Companion to Comparative Law*, Mauro Bussani/Ugo Mattei (Editors), Cambridge, United Kingdom, Cambridge University Press, (2012): 3 (arguing that to duly understand comparative law one must not lose sight of the fact that legal transplants accounts for «the borrowing of ideas between legal cultures and/or systems»).

53 W. Twining, "Globalisation and Comparative Law", Esin *Örücü*/D. Nelken (editors), *Comparative Law. A Handpaper*, Oxford, Hart Publishing, (2007): 69-89.

54 Converging, B. V. Pires, "Origins and Early History of Macau", 2nd edition, R. D. Cremer (ed.), *Macau: City of Commerce and Change*, Hong Kong, API Press, (1991): 1-7 ff. For further developments: *Albert H.Y. Chen and Peter C.H. Chan, An Introduction to the Legal System of the People's Republic of China (Sixth Edition), under contract with LexisNexis, forthcoming 2026; Peter Chi Hin Chan, Mediation in Contemporary Chinese Civil Justice: A Proceduralist Diachronic Perspective. Leiden & Boston: Brill Martinus Nijhoff Publishers, 328 pages. Aug 2017.* Peter C.H. Chan and Shen Guotong*, "Court Personnel Management Reforms in China: Have They Enhanced Judicial Professionalism?", *Modern China*, forthcoming 2025; Shen Guotong and Peter C.H. Chan, "The Party's Court or the Court for the Parties: An Empirical Assessment of the Fifth Judicial Reform in China", *University of Pennsylvania Asian Law Review*, forthcoming 2025; Wu Wanqiang, Peter C.H. Chan, and Lin Xifen, "Urban Pollution Governance, Prosecutor-led Environmental Public Interest Litigation, and Regional Environmental

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rent civilizations and starkly different cultural backgrounds. Naturally, Jorge Álvares´ endeavours were not unbeknownst to the Portuguese King as he envisioned a trade expansion to the Far East[55].

Portuguese Prince´s (Henry the Navigator) pristine entrepreneurship vision[56] yielded palpable results belatedly though. It was not until 1557[57] that commercial rewards started to pour in as business trades with local Chinese authorities bloomed[58] from that date onward[59]. Signalling Portuguese gradual permanence in Macau, Chinese officials

Disparities in China: Evidence from 282 Cities", *China: An International Journal* 22(4), 73–95, 2024; Peter C.H. Chan and Wu Wanqiang, "From 'Line Appraisal' to 'Case-Process Ratio': Will the New Case Quality Assessment System Facilitate the Changing Role of the Chinese Prosecutor?", *Hong Kong Law Journal* 54(1), 205-231, 2024; Peter Chi Hin Chan, "Old Wine in a New Bottle? – An Empirical Evaluation of the Judicial Reforms in China in the 2010s", *UC Law SF International Law Review* (formerly *Hastings International and Comparative Law Review*) 42(2), 87-128, 2024; Peter Chi Hin Chan, "Does Black-Letter Law Matter in Labor Rights Protection in China? - A Tale of Two Cities", *Washington International Law Journal* 33(2), 345-388, 2024; Peter Chi Hin Chan "Judicial Reform in China: What Do Judges Think?", *International Journal of Procedural Law* 13(2), 312-330, 2023; Peter Chi Hin Chan, "The Regulation of Dismissal in China: Diverging Standards of Serious Breach Dismissal and the Need for Reform", *King's Law Journal* 33(2), 208-227, 2022.

55 Despite historical accounts stating that Portuguese establishment in Macau emerged from an informal agreement between the Portuguese Captain Chief of Maritime Journey to China and Japan (*Capitão-Mor da Viagem da China e do Japão*) and Chinese ruling authorities of Canton (Macau´s closest neighbour which exerted power over Macau back then). Being this informal agreement unbeknownst to both the Portuguese king and the Chinese emperor; see in the Portuguese doctrine, João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *Estudos Comemorativos XX Anos do Código Penal e Código de Processo Penal de Macau*, Pedro Pereira de Sena e José Miguel Figueiredo (Coordenação Científica), Macau, Fundação Rui Cunha, (2016): 62. See also: Leong Cheng Hang, "Investing in Macao - New Opportunities and Challenges Under the New Macao Financial Regulations", "International Investment Law at the Juncture", Springer, 2024; Leong Cheng Hang, Macau banking law and financial institutions, Research Handbook on Asian Financial Law, Edward Elgar Publishing, 2020.

56 Beatrice Leung, "The Portuguese Appeasement Policy in Macau´s Church and State relations", *Journal of Contemporary China*, 19 (64) (2010): 181-200 («In the Middle Ages, Europe was not able to contact Asia due to the Muslim occupation in between. The Portuguese Prince, Henry the Navigator (1394–1460), launched exploratory voyages along the western coast of Africa and eventually Vasco da Gama reached India (1460–1524)»).

57 When it comes to describing the relationship between Chinese and the Portuguese back then, tolerance is a word that one should bear very firmly in mind. Although it is accurate to assert that the early Portuguese (sailors, settlers, and business men) began to exercise trade with local Chinese authorities from 1557 onwards, there are a few historical accounts that signal an early *tolerance* towards the Portuguese in this regard dates as far back as 1535. From this date onward, the Portuguese business men and sailors were given a «sort-of» free pass to anchor their ships and perform some business activities provided they did not stay onshore; see, G. L. Zhao/Liu G. L., *A New Conspectus of Macau law*, Macau, Macau Foundation, (2005): 2 ff and passim.

58 Trust and Trustworthiness, which are fuelled by a prior creation of a harmonious and healthy relationship (a hallmark of Confucian-beliefs-based Chinese culture), might help explain this time gap. First establish rapport and trust then (and only then) do business. Back then just like now Chinese millenary culture would not fall far behind from its founding tree (Confucianism). Back then just like now culture nurtured business and trade relationships. One can foresee the omnipresence of my concept of *law and social reality* to its fullest extent. See on Trust and Trustworthiness in contract law and public policy, Matthew Harding, "Trust and Fiduciary Law", *Oxford Journal of Legal Studies*, 33 (2013): 81 ff; Mark A Hall, "Law, Medicine, and Trust", *Stanford Law Review*, 55 (2002): 463 ff; Matthew Harding, "Responding to Trust", *Ratio* Juris, 24 (2011): 75 ff; Mark A Hall, "The Importance of Trust for Ethics, Law, and Public Policy", *Cambridge Quarterly of Healthcare Ethics* 14 (2005): 156 ff.

59 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *Saidat Law Review (SLR), Legal culture and Legal Transplants*, 1 (Special Issue 2) (2012): 644-645 (630).

demanded ground rent payments, which began in 1573[60]. From that point onward, Religion (concretely: Christianity brought along by the Portuguese Jesuits) has begun to exert its influence[61] in Macau[62] at the *second layer of law and social reality*.

Such a fortunate event has paved the way to the thriving/blossoming of Sino-Portuguese trade and diplomatic relations: «after strong ruptures of the seemingly harmonious relations and military encounters between the Chinese and the Portuguese merchant sailors, in 1557, local Chinese officials allowed the Portuguese to settle in Macau permanently against the payment of an annual rent of 500 taels of silver. However, there was no written agreement. «It is assumed that this permission was given because the Portuguese helped China to expel pirates around the southern sea of China»[63].

This event has augmented the levels of trust[64/65] and has bolstered amicable relations[66]/[67] between Chinese authorities and Portuguese traders[68]. As a result, the Portuguese were awarded the long-sought permission to settle in Macau and establishing

60 *Id.*

61 See Rosemarie Wank-Nolasco Lamas, *History of Macau – A student´s manual*, 1st edition, Macau, Institution of Tourism Education, (1998): 18 ff.

62 Religion (especially, Christianity brought along to Macau by Portuguese Jesuits) played a major social and demographic role in Macau both before and after 1573. Before the construction (in 1573) of the China-Macau border gate (*Portas do Cerco*), there were no Chinese non-converted to Christianity living in Macau. An exception was made to the Chinese that were converted to Christianity. From the construction of *Portas do Cerco* onwards, Chinese non-converted to Christianity were allowed to work in Macau provided they did not stay overnight. They were forced to go across *Portas do Cerco* towards China before sunset in a daily basis. Chinese non-converted to Christianity were not allowed to live nor possessing any kind of property in Macau, unless special authorisation was issued by the *Procurator* (*Procurador*). Those (Chinese non converted to Christianity) who got caught both living and working illegally in Macau were to be chastised with merciless corporal punishments; see C. A. Montalto de Jesus, *Macau Histórico*, tradução do inglês por Maria Alice Morais Jorge, 1a edição, Macau, Livros do Oriente, (1990): 58 ff. See also: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 62 ff and passim, whose research I will follow closely in this regard.

63 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *Juridikum, Zeitschrift für kritik/recht/gesellschaft: thema recht (de) kolonisiert*, 2010 (3), (2010): 288.

64 See Bong Yin Fung, *Macau: a General Introduction. Hong Kong*, Hong Kong, Joint Publishing (Hong Kong), (1999): *passim*.

65 Trust and trustworthiness have always been the basis to the development of contracts, businesses, and corporate deals. See in the North American doctrine: Roger Cotterrell, "Trusting in Law: Legal and Moral Concepts of Trust", *Current Legal Problems* (CLP) 46 (1993): 73 ff; Margaret M Blair and Lynn A Stout, "Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law", *University of Pennsylvania Law Review*, 149 (2001): 1733 ff.

66 Matthew Harding, "Manifesting Trust", *Oxford Journal of Legal Studies*, 29 (2009): 243 ff; Anthony J Bellia, Jr, "Promises, Trust, and Contract Law", *The American Journal of Jurisprudence*, 47 (2002): 23 ff (on the seminal concept of trust and trustworthiness).

67 In a similar stance, Tom Tyler, "Trust and Law Abidingness: A Proactive Model of Social Regulation", *Boston University Law Review*, 81 (2001): 359 ff (on the importance of trust).

68 In the Portuguese doctrine: Jorge Noronha e Silveira, *Subsídios para a História do Direito Constitucional de Macau, 1820-1974*, traduzido por C. Y. Sam and H. F. Vong, Macau, Gabinete de Tradução jurídica/ADAT, (1997): 1 ff.

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commercial trade relations with China[69] and beyond. It is believed that the settlement of the Portuguese in Macau stood as a token of appreciation for the Portuguese military endeavours in southern sea of China[70].

China exerted a sizeable power at the outset of 16 th century. China had a sword. The most powerful one of all back then: economic power. China wielded the sword of economic power with overwhelming prowess. No wonder that such majestic economic power beguiled the Portuguese traders to the confines of the uncharted world. Here is why: «at the beginning of the 16th Century, China was a dominant economic force in the global trade scenario. Its massive production of porcelain and silk, as well as the crazy demand for silver created great opportunities for profits, which stimulated trans-continental commerce. Even when the economy of China faced a recession in the subsequent centuries, it continued to be the largest integrated economic system in the world. It is particularly interesting that land productivity in the four most productive provinces of China was much higher than land productivity in England and Wales, the most prosperous countries in Europe».[71]/[72]

To the extent that China had reached the zenith of its economic power, Portugal did not lag far behind. Coincidentally (or not), the 16th century constituted the onset of a golden era as far as navigation and trade were concerned. Portuguese sailors navigated to the confines of the uncharted world reaching out to a wide range of countries, cultures and civilizations thus connecting both edges of the known and of the unknown world[73]. The trade settlement in Macau would serve a larger purpose such as establishing a regional and gravitational trade (and evangelization-missionary-driven) network in the Far-East[74] ranging from Macau, Malaca, and (to) Japan[75].

69 China was a powerful economic giant at the outset of the 16th century. See: Dennis O. Flynn and Arturo Giraldez, *China and the Birth of Globalization in the 16th Century*, Surrey, Ashgate Variorum, (2010): 215-219.

70 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *Juridikum, Zeitschrift für kritik/recht/gesellschaft: thema recht (de) kolonisiert*, 2010 (3), (2010): 288.

71 *Id.*

72 In a similar vein, Jürg Helbling, *Agriculture, population and state in China in comparison to Europe population and economic development in China and Europe*, Stuttgart, Breuninger Stiftung GmbH, (2003): 118; *apud*, Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 288.

73 In Portuguese doctrine, Manuel António Hespanha, *Panorama da História Institucional e Jurídica de Macau*, Macau, Fundação Macau, (1995): *passim,* whose research I will follow closely.

74 In Portuguese doctrine, João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*:62.

75 There are some historical accounts that tell us that the Portuguese set foot in Japan accidentally thus paving the way to a rather lucrative commercial route indeed. Malaca (a then Portuguese lucrative stronghold at the Far East) served as a liaison trade route with the newly «conquered» Kyushu, Japan. Macau acted as a secure trading point aimed at guaranteeing that a continuous stream of businesses continued to flow from and to China. Buying silk from China, the bulk of the products sold in the distant Japan, was one of the overriding commercial goals. See: Charles Ralph Boxer, *Fidalgos no Extremo Oriente,* Fundação Oriente e Museu e Centro de Estudos Marítimos de Macau, tradução de Teresa Bairrão Oleiro e Manuel Bairrão Oleiro, (1990): 8-16. See: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*

Unlike China, Portugal had unanswerable ties with the Catholic Church and Christianity[76] – a cultural and religious[77]/[78]/[79] connection[80]/[81] that would prove important to the Portuguese community in Macau, and to the creation and maintenance of the *two-layered cultural originalism* still in force in this tiny Peninsula, as further shown below[82]. Back then, Catholic Church exerted its mighty power by dividing the charted world between Portugal[83] and Spain[84].

Thereafter, Portugal seized power over Brazil (an enormous mass of land loaded with natural resources) and India (a-no-less gigantic and opulent country). The economic power brought along by these wealthy colonies consolidated Portugal´s clout in

76 Beatrice Leung, "The Portuguese Appeasement Policy in Macau´s Church and State relations", *cit.*: 181-200 («In 1454, the Pope granted Henry all the rights south of the Tropic of Cancer, with latitudes 23 degrees north of the Equator, as well as power over the missionary bishops therein. This practice is called the 'Padroado' which allowed the patronage of the Portuguese court over missionary activities in the conquered lands of the New World. In return, the Catholic Church obtained permission to Christianize the Portuguese colonies»).

77 On the cultural and religious influence from a legal debt collection standpoint; in Swiss French-speaking doctrine, Bernard Piettre and François Vouga, *La dette. Enquête philosophique, théologique et biblique sur un mécanisme paradoxal*, Genève, Labor et fides, (2015): *passim.*

78 In German doctrine, on the tandem between theology, philosophy, natural law and restitution, Nils Jansen, *Theologie, Philosophie und Jurisprudenz in der Spat scholastischen Lehre von der Restitution. Außervertragliche* Ausgleichsansprüche *im frühneuzeitlichen Naturrechtsdiskurs*, Tübingen, Mohr Siebeck, (2013): *passim*.

79 In the same vein, in Italian doctrine, Arrigo Diego Manfredini, *Rimetti a noi i nostri debiti. Forme della remissione del debito dall'antichità all'esperienza europea contemporanea*, Bologna, Il Mulino, (2013): *passim*.

80 The influence of law and religion (concretely, Christianity) on a given legal framework is being hotly discussed by scholars. Such debate rests upon a simple question: a debt forgiveness to the poor is based on moral grounds, cultural, moral or religious ones? «Debt forgiveness is at the heart of the gospel message. The Lord sent His Son to redeem the debts of the world created by Adam and Eve and that were transmitted to subsequent generations of humanity. The New Testament restored older biblical ideas of debt relief, such as the Jubilee. The Lord's Prayer begs God to forgive the pious their debts, as they also forgive their debtors (Mt 6:12). Yet what, if anything, does that mean for legal practice? Is there a Christian mode of debt collection and enforcing contractual promises? Should Christian creditors refrain from exercising their rights? »; Wim Decok, Law, "Religion and Debt Relief: Balancing above the "Abyss of Despair" in Early Modern Canon Law and Theology", *The American Journal of Legal History*, 57 (2017): 125–141.

81 Providing a far-reaching overview about legal scholarship both in ancient and modern times, James Gordley, *The Jurists: A Critical History*, Oxford, Oxford University Press, (2013): 18 ff.

82 See: Point 5. to point 5.2. of this paper.

83 Portugal, just like Spain, was a highly stratified and socially imbalanced society as far back as the 16th century and beyond, which could have prompted young sailors to embark in a caravel and sail across the world on a pursuit of a better fortune. About this social imbalance in Portugal: Nuno Brandão, "Desobediência e resistência a ordens de autoridade no período das ordenações", *Direito Penal. Fundamentos Dogmáticos e Político-Criminais. Homenagem ao Prof. Peter Hünerfeld,* Manuel da Costa Andrade *et alii* (org.), Coimbra, Coimbra Editora, (2013): 1183 ff and passim.

84 In the Portuguese doctrine, José Hermano Saraiva, *História Concisa de Portugal*, Lisboa, Editora Montanha das Flores, (1994): 28 ff. A converging take has been written by acclaimed doctrine, who (m) has provided a scintillating portray of sixteenth-century Mediterranean societies grappling with the rising of an honour-based criminality and misdeeds alike: Scott K Taylor, *Honor and Violence in Golden Age Spain,* New Haven, Connecticut, Yale University Press, (2008): 28 ff. Although shaping up to be both a maritime and economic giant, there are nuanced historical accounts stating that Spain struggled to tackle social skirmishes, which have revolved around keeping the social status and social hierarchy of its aristocrats; Wim Decok, "Law, Religion and Debt Relief: Balancing above the "Abyss of Despair" in Early Modern Canon Law and Theology", *cit.*: 133 ff.

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the Middle Age world. Portugal was one of the wealthiest and prosperous countries in the Middle Age world. But circumstances were to alter. Portugal´s streak of luck and prosperity would suffer a downturn (yet a transient one).

«Shortly after the promulgation of a *new world order*, the occupation in India and Brazil brought in large areas of land and supply of natural resources, while the settlement in Macau opened the gate for a bigger volume of trans-continental trade. In this period, the Portuguese were busily shipping silver and timber from America and spices (pepper) and porcelain from the Far East. The international trade was extremely profitable. However, when prices of goods in Europe were boosted and trade competition aggravated in the late 16th century, Portugal quickly fell into deficit. In the 17th Century, the Royal Court even had difficulties in paying the salaries of its officials»[85].

Despite this ephemeral economic setback, Portugal´s fortune would be reversed. Again. A fortunate stroke of serendipity would bless Portugal. This time taking a turn for the best: «It was the discovery of a gold mine in the 18th century in Brazil that saved the last vestige of dignity of this first-generation empire»[86].

Against this background, the time is ripe as to sketch out – in broad strokes - the outset of a *two-layered law and social reality* of *two-layered cultural originalism*[87] in Macau, which dates back the year of 1557 and still ripples forward.

4.1.1. The outset of a *two-layered law and social reality* and of a *two-layered cultural originalism* (1557-1573): The dawn of the era of «what is mine is mine and what is yours is yours»

As hinted above, Portugal´s permanence in Macau dates as far back as 1557. The arrival of a foreigner (a total stranger) from half way across the world posed a sizeable (social and legal) challenge to Macau. Whereas one could anticipate that this clash between two radically different civilizations would be neither smooth nor without a certain amount of social (and even legal) challenges, the considerable social and legal changes that this minimal Peninsula underwent pursuant the arrival of the Portuguese traders would fall far beyond one´s rosy expectations.

Amongst which stands the creation of a *two-layered law and social reality* and an exquisite *two-layered cultural originalism* which has survived to this day. The distant year of 1557 marked the inception of a *two-layered cultural originalism*[88] in Macau: Confucianism-based beliefs upheld and nourished by most Chinese residents living si-

85 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 288.

86 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post-Colonial" Context", *cit.*: 288.

87 See: Point 5. to point 5.2. of this paper.

88 See: Point 5. to point 5.2. of this paper.

de-by-side with Christian-based faith nurtured by the early Portuguese settlers and Portuguese Jesuits[89]. More on this later[90].

At first blush, this finding does not seem flummoxing. A closer look to the extant literature[91] gives us the vivid impression that scholars have just pinpointed a legal dualism though. In sum, just a legal dualism was broached. Neither a two-layered law and social reality nor a two-layered cultural originalism were parsed. Just a so-called *legal dualism*[92], which has pervaded Macau legal history.

There is no legal dualism (or doctrinal classifications alike) decoupled from a *law-in--context* legal research methodology[93]. Respectfully, there is no such thing as ascribing a given doctrinal qualification to a given legal framework without providing a dogmatic and methodological account of it[94]. Let alone a proper and sound academic legwork[95].

The characteristics of a two-layered law and social reality began at the commencement of Portugal´s permanence in Macau (as far back as 1557), as further shown below. The emergence of a *two-layered cultural originalism* would not lag far behind, as sketched out further down in this paper[96].

89 Before 1573, regular Chinese (meaning: non–Christians converted to this religious faith) were not allowed to stay in Macau overnight. They were forced to leave Macau prior the sunset. Only Chinese that were converted to Christianity could live and work in Macau permanently; See: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 63.

90 See: Point 5. to point 5.2. of this paper.

91 One of the most renowned scholars in Macau gives us the historical account Confucian´s normative system subsistence and pristine maintenance of Chinese customary practices. Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 630 ff.

92 One of the most emphatic accounts of that *legal dualism* (with which I fully agree to the extent that captures to picture of a bifurcation between Chinese laws and Portuguese laws since immemorial times) can be found in an academic paper published in Hong Kong Journal which reads as follows: «*A dualism has been shown in all aspects of life*: in the exercise of political power, *the administration of justice*, religious structures, trade affairs, even the urban administration»; R. Pereira Alfonso, "The Political Status and Government Institutions of Macau", *Hong Kong Law Journal*, 16 (1) (1986): 28-48.

93 Methodology concerns, which have reached Public Law´s breadth too. See D. Dragos & P. Langbroek, 'Law and Public Administration: a Love-Hate Relationship?', in E. Ongaro & S. van Thiel (eds.), *The Palgrave Handpaper of Public Administration and Management in Europe* (2017), London/New York/Melbourne/Palgrave Macmillan, (2017): chapter 54.

94 In a similar take, P. Glenn, 'Legal families and legal traditions', M. Reimann & R. Zimmermann (eds.), Oxford, Oxford Handpaper of Comparative Law (2008): *passim*.

95 Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo, Wibo van Rossum "Methodology of Legal Research: Challenges and Opportunities", *Utrecht Law Review*, Volume 13 (3), (2017): 1-2 («*In traditional legal research, academic lawyers usually do not refer to any methodology at all. Increasingly, traditional legal research is confronted with the challenge of making its methodology explicit and even of rethinking it*. Academics of different disciplines point at the lack of reflection on methodological considerations in most traditional legal research designs as they compare this with what is common in their own disciplines. I*n many academic legal publications, research design and accounts of methods used are not discussed in detail*. Usually, validity issues are ignored altogether. *The question then becomes how legal research methodologically evolves, what steps should be part of it, and why, and what constitutes the validity of legal research*. Experience teaches us that scholars in the different disciplines in the social sciences have their own methodological preferences and conventions. Psychologists, for example, in general prefer experiments over other methods, whereas public administration scholars tend more towards the opinion that qualitative empirical research and quantitative approaches should be combined with literature review, in a mixed methods approach» (italics added).

96 See: Point 5. to point 5.2. of this paper.

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4.1.1.1. The inauguration of a *two-layered law and social reality* mirrored on the coexistence of Chinese laws (Law of Great Ming) and Portuguese laws (the Ordinance period - Ordenações Afonsinas, Ordenações Manuelinas and Ordenações Filipinas) (1573-1849)

For a long-winded and long-drawn-out span of time, Chinese bodies of laws (*Law of Great Ming*)[97] and general Portuguese laws (arising out the enactment of the dubbed Ordinations)[98] have coexisted in the small territory of Macau: «In the 16th century, in Ming China, in an informal sense, were included in a compilation named «*Da Ming Lu*» **(***Law of Great Ming*), a compilation of rules (above all criminal rules). For civil law matters, although the idea of a judicially enforceable agreement («*yue*»**)** appeared already in the Han Dynasty, the state never deemed it necessary to promulgate a body of rules describing the details of such matters during the whole imperial period (up to the last years of the Qing Dynasty)»[99]. This is the *legal layer*.

At the *cultural layer*, alongside with this relative informal compilation of laws, which constituted the backbone of Chinese legislation ranging from Han Dynasty to Qing Dynasty, a pristine Confucianism normative system comprising norms of rites («*Li*»**)** coexisted with customary practices[100] in China[101] (and Macau) for over 2000 years in China´s millenary imperial history[102].

97 Y.G. Su, *Ming Qing Lú Dian Yu Tiao Li (Codes and Regulations in the Ming and Qing Dynasty)*, China, CUPL Press, (2000): 93-98 (providing an overview about Ming and Qing Dynasty legal regulations in Imperial China).

98 In the Portuguese doctrine, for a nuanced historical account about the Epoch of Ordinance, Mário Júlio de Almeida Costa, *História do Direito Português*, Coimbra, Almedina, (1996): 272-338 (stating the origins, scope and width of Epoch of Ordinance and its impact in Portugal´s legal history).

99 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 289.

100 Zh. P. Liang, *Customary law in Qing Dynasty: Society and State*, China, China University of Political Science and Law Press (CUPL Press), (1996): 1 ff. See also: Hugh T. Scogin, Jr., Civil "Law" in Traditional China: History and Theory", *Civil Law in Qing and Republican China*, Redwood City, California, Stanford University Press, (1995): 28 ff. (emphasizing the paramount importance of this set of norms of rites and customary practices in China Imperial legal history).

101 Land law in China (profoundly interwoven with foundational concepts of public and private property) deserves the wealth of a footnote: «As far as land is concerned, one final remark must be made on Chinese law before we can move on to discuss the Macau case critically. In relation to the idea of land ownership or rights on lands, the earliest and most frequently cited text is a song from the Paper of Poetry which reads as follows: Under the wide heaven, all is the King´s land. Within the sea-boundaries of the land, all are King´s servants" (Northern Hill, Minor Odes of the Kingdom, The Paper Of Poetry). By a very restrictive and isolated reading of the above song, it seems that in ancient China (Zhou Dynasty or earlier, some 3000 years ago) there was no room at all for ordinary people to possess any right on land. However, it is strongly questioned to what extent the royal control over land was effectively exercised in such a big country and whether civic and economic activities did not imply al least a minimal basis of "private property". Passages in other classic documents such as the Mencius and Paper of Rites seem to indicate that a kind of feudalism was generally practised in the Zhou Dynasty, so that several layers of possession could be established on the on the same piece of land nominally belonging to the King. The widespread prevalence of private property as well as the official recognition of private land as distinct from public land occurred in the period of the Tang Dynasty (79 A. D.). The "Six Codes of Tang" (elaborated in 738 A.D.) implied a detailed system to distribute land to ordinary people. And most important of all, public and private land was equally protected. The land system established in the Tang Dynasty was inherited in the following centuries by other forthcoming dynasties (including Ming and Qing) with some modifications. Generally speaking, throughout the whole Chinese history (except maritime period), "land property rights" were respected by the central and local governments most of the time. Recently, a western scholar noticed that in early modern China, there was a strict link between tax payment and the protection of land property. A tax payment receipt not only served as a proof of liquidation of tax duty, but also of land transaction; sometimes, it even legitimised an illegal occupation of land»: see: Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 290.

102 *Id.* at 289. See also: António Manuel Hespanha, *Panorama Histórico do Direito Chinês. O Pensamento Jurídico*, Macau, Faculdade de Direito da Universidade de Macau, (1994-1995): passim.

On the opposite pole, Portuguese legal history has been pervaded by a long period of compilation of laws[103]. Such a long-haul span of time stretched from 16th Century to the 19th Century – the tagged Epoch of Ordinance[104]. Ordinations were typically a miscellany of compiled ordinances[105] ranging from the temporal period of *Ordenações Afonsinas* of 1446, *Ordenações Manuelinas* of 1514, *Colecção de Leis Extravagantes de Duarte Nunes do Lião* of 1569, to the hailed *Ordenações Filipinas* of 1595[106]. It is often stated that *Ordenações Afonsinas*[107] stood as the benchmark to the subsequent ones[108].

At the *second layer of law and social reality*, the influence of a paramount Luhmann´s social sub-system[109] named Religion (*pactum subjectionis*[110/])[111/112] on

103 This Epoch of Ordinance has been hailed as one of Portugal´s turning point in terms of administration of justice and of a thrust to centralize and exert power over the fullest extent of its colonial territories; In the Portuguese doctrine, Henrique da Gama Barros, *História da Admninistração Pública dos Séculos XII a XV,* Tomo I, Lisboa, Imprensa Nacional, (1885): 72 ff.

104 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 289.

105 Mário Júlio de Almeida Costa, *História do Direito Português*, *cit.*: 272-338.

106 In the Portuguese doctrine, Mário Júlio de Almeida Costa, *História do Direito Português*, *cit.*: 272-338.

107 To a certain degree, the Portuguese Royal power has shared its clout with the no-less robust religious power (Catholic Church and its accompanying Christian faith). To some extent, they were both «powers in arms» or «brothers in arms» (so to speak). No accurate analysis on Portuguese sovereignty in Macau can possible overlook such an interplay. See in the portuguese historical doctrine: Armindo de Sousa, *História de Portugal, A Monarquia Feudal (1096-1480)*, José Mattoso (coord.), Lisboa, Editorial Estampa, (1993): 371 ff. (No reference to Macau was made though). The Portuguese King Afonso III played a pivotal role in both centralizing the ruling power and shifting it (almost) entirely towards the Royal clutch. See in Portuguese doctrine, A. L. Carvalho Homem, *Nova História de Portugal, III – Portugal em Definição de Fronteiras (1096-1325). Do Condado Portucalense à Crise do Século XIV*, Maria Helena Cruz Coelho/A. L. Carvalho Homem (coord.) Lisboa, Editorial Presença, (1996): 133 ff.

108 Mário Júlio de Almeida Costa, *História do Direito Português*, *cit.*: 272-338.

109 For a nuanced and fine-grained account on Luhmann´s social systems: Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation (Against the Background of a Narrative of Social Sub-systems in Everlasting Cross-Fertilization)*, Singapore/Beijing/Berlin/New York, Springer Nature, (2023): 1-217, which I will follow closely in this regard.

110 *Pactum subjectionis* has been inscribed at Digesto´s (1, 4, 1) in the following excerpt (in Latin), which reads as follows: «*quod principi placuit legis abet vigorem; utpote cum lege regia, quae de imperio ejus lata est, populus ei et in eum omne sum imperium et potestaem conferat*». See in the Portuguese doctrine, José Adelino Maltez, *Nova História de Portugal*, Vol. V, - *Portugal. Do Renascimento à Crise Dinástica*, J. J. Alves Dias (coord.), Lisboa, Presença, (1998): 370 ff; Luís Cabral da Moncada, *Filosofia do Direito e do Estado*, 2ª edição, reimpressão, Vol. I, Coimbra, Coimbra Editora, (1995): 73 ff; Manuel Paulo Merêa, "As teorias políticas medievais no "Tratado da Virtuosa Bemfeitoria", *Estudos de História do Direito*, Coimbra, (1923): 179 ff.

111 This finding (*pactum subjectionis*) chimes in with the Thomistic Philosophy background according to which King´s supremacy derived from the dubbed *pactum subjectionis*: all power derived from a greater source (God Almighty) which was subsequently imparted to the people and thereafter to the king. See: Thomas Aquinas, *Summa Theologica*, V Volumes, Christian Classics; English Dominican Province Translation edition (June 1, 1981), (1981): passim (on these astounding essays a detailed account on Christian thought is provided – a paper which has had a paramount and ground-breaking impact on philosophy and religion since the thirteenth century sending ripples across the navigable eternity).

112 António Manuel Hespanha, *História das Instituições. Épocas Medievais e Moderna*, Coimbra, Almedina, (1982): 199 ff; Marcelo Caetano, *História do Direito Português*, I Volume, Lisboa, Verbo, (1981): 469 ff.

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the enactment[113] and interpretation of the Ordinances[114] was (thus) ubiquitous. This compilation - or miscellany - of Ordinances was far from being a mere amalgamation of rules and laws though. Ordinances encompassed a far-reaching and overriding objective of regulating nearly-all aspects of Portugal´s legal life[115] ranging from administration of justice, ground taxes, local taxes, royal and municipal posts, criminal offences, and misdeeds, to civil matters and beyond (even legal procedures)[116].

Reinforcing an evident connection between Portuguese law and Catholic Church[117] (*at the second layer of law and social reality*), citizens´ personal status was regulated by an entirely different body of laws[118] – Canon-Catholic-inspired-Law and Roman-Catholic-inspired-Law[119/120/121]. Against this backdrop, no surprise springs from the fact that a batch of

113 A converging stance can be found in: Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 289.

114 Mário Júlio de Almeida Costa, *História do Direito Português*, *cit.*: 272-338.

115 Thus further blurring the lines between private sphere (private law) and public sphere (public law). See: John Christman, *Myth of Property: toward an egalitarian theory of ownership,* Oxford, Oxford University Press, (1994): *passim*. For a brief thumbnail sketch about public land property system in Imperial China, Y. Li/ J. G. Wu, *A historical account of public land property system in ancient China*, China, Yunan People Press, (1997): 9 ff.

116 Mário Júlio de Almeida Costa, *História do Direito Português*, *cit.*: 272-338.

117 *Id.*

118 *Id.*

119 *Id.*

120 Roman´s law influence in Portugal legal system was indisputable. Especially from the land law standpoint. Controversies on the breadth and scope of Portuguese laws (Roman-law-inspired) and the extent of the permission granted by the Ming Dynasty to the Portuguese to settle in Macau have been hanging aloft for a protracted period of time. Unsurprisingly, the Chinese tolerance towards the Portuguese has been pinpointed by renowned doctrine: «Before the colonial period, the Portuguese land law (comprising those in the Ordinance and Roman law) was already the only land law applicable in Macau. However, two inferences drawn from those set of documents do not allow for this assumption. First, the order of the Qing officials clearly demonstrated that Chinese living inside Macau, before the Portuguese moved in, were allowed to stay and own their property or to transact it in accordance with Chinese law. Second, the above-mentioned Portuguese prohibitions imply that there were Portuguese residents ignoring the rule and selling and mortgaging house to Chinese. Therefore, the most reasonable conclusion shall be that before the colonial period, the Portuguese land law applied land law dominantly inside Macau inside Macau but in general, it was still a system of legal pluralism. (.....) Portuguese land law was at least applied on transactions of landed property in Macau, though not exclusively. It is also clear that in the Portuguese legal system of the 16th century, Roman law was the main body of law governing land transactions and civil life in general. According to the Roman legal concept, a sale or purchase of land is only valid if the seller has ownership. However, it is assumed that the Portuguese were asked to pay a ground rent (*foro de chão*). Hence, the tenure they had over Macau lands must be considered as a lease, which is a concept clearly different from ownership under Roman law. However, this dogmatic contradiction was considered neither by the Portuguese nor by Chinese living in the area. Even according to official records from both sides, lands in Macau were protected and transferred, as if the Portuguese did have ownership. Of course, this was in accordance with Portuguese interests. However, it is less clear why also Chinese disregarded this contradiction. For them, the permission given by the Ming Dynasty and later by the Qing Dynasty implied only the right of the government to supervise the activities of the Portuguese and to collect rent from them every year. They had no difficulties qualifying a Portuguese settler who built a house inside the rented territory as the owner of that land and house. In fact, for ancient Chinese intellectuals and government officials the border line between politics and law was blurred. Besides, since the so-called "lease" was not a written agreement, in the Qing Dynasty, it was almost impossible to define the exact area rented to Portuguese settlers. However, it should be noted that throughout the late Ming Dynasty and Qing Dynasty, the Portuguese were not allowed to build new houses without permission of Chinese officials, and the original area attributed to the first comers extended only the size of one narrow street (from the Fortaleza Monte to the Colina de Penha). Despite all these constraints, starting from the 17th century, the Portuguese, through various means, gradually occupied the lands surrounding the original settlement spot. As a consequence, Portuguese assumption primitive rights over the lands they occupied the lands they occupied without the permission of Chinese remained controversial in later periods»; Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 291-292.

121 See also about this period: Geoffrey C. Gunn, *Encountering Macau: A Portuguese City-State on the Periphery of China*, Gunn Editions, (2005), 8 ff.

Luhmann´s social sub-systems (ranging from religion, law, and culture) were interacting with each other on a permanent basis back then. A connection that the Ordination Epoch (*Época das Ordenações*) would stiffen.

When the Portuguese established themselves in Macau (back in 1557), *Ordenações Manuelinas*[122] were in force[123]. It should not come as a surprise that from this moment onwards «all major changes in the continental Portuguese legal system affected Macau law»[124].

Notwithstanding some major subjective exceptions, *Ordenações Manuelinas* were also applicable in Macau from that date (1557) onward[125], as further shown below. Consistent with an early stage of a *two-layered law and social reality*, Portuguese law was only applicable to Portuguese or Chinese converted to Christianity[126]. Chinese law was applicable only to Chinese (who upheld a Confucianism-based culture and beliefs)[127].

4.1.1.2. A *two-layered law and social reality* in the administration of justice in Macau – The Captain Chief of Journey of China and Japan (*Capitão-Mor de Viagem da China e do Japão*) and the Chinese Justice named Mandarin (1573-1623)

A two-layered law and social reality could be also ascertained at the administration of justice level. Two separate bodies of administration of justice coexisted. At the *first layer of law and social reality*, there was a system administration of justice for Chinese who nurtured Confucianism-based beliefs. At the *second layer of law and social reality*, there was a system of administration of justice for both Portuguese and Chinese converted to Christianity (to whom both the Portuguese law and Portuguese administration of justice applied).

At the *second layer of law and social reality*, the Captain Chief of Journey of China and Japan (*Capitão-Mor de Viagem da China e do Japão*)[128], has received from the Portuguese crown a wide-scope mandate to exert powers[129] at the administration of justice level in Macau[130].

122 A converging stance can be found in: Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 289.

123 Mário Júlio de Almeida Costa, *História do Direito Português*, *cit.*: 272-338.

124 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 289.

125 *Id.*

126 António Manuel Hespanha, *Panorama Histórico do Direito Chinês. O Pensamento Jurídico*, *cit.*: 31-46.

127 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 291.

128 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 62.

129 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 69 ff.

130 Charles Ralph Boxer, *Fidalgos no Extremo Oriente*, *cit.*,: 12 ff.

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Captain Chief of Journey of China and Japan (*Capitão-Mor de Viagem da China e do Japão*) was chosen annually either by the Portuguese King[131] or the Vice King of India amongst a cohort of noble citizens[132] amenable - some would say entitled - [133] to receive such a high distinction[134]. Such an honorific award was mainly due to outstanding contributions to the Portuguese crown[135] in a given span of time[136].

If such an award was granted to a *Capitão-Mor de Viagem da China e do Japão,* he would wield a sizeable power in (at) the Far East[137]. Especially from the trade and commerce standpoint[138]. *Capitão-Mor de Viagem da China e do Japão* would rule with a nearly-absolute and undisputed power[139]. Alongside the trade and commerce monopoly[140], *Capitão-Mor de Viagem da China e do Japão* was allotted a representative role[141].

This role entailed representing Portuguese crown´s interests in commercial strongholds[142] held in-between Malaca and Japan[143]. *Capitão-Mor de Viagem da China e do Japão* was assigned a handful of administrative chores[144] ranging from anodyne to highly relevant ones. Such as the administration of justice[145]. *Capitão-Mor de Viagem da China e do Japão* exerted this power towards either Portuguese citizens[146] or newly--converted Christians (*cristãos novos*)[147] living in newly-conquered colonies or newly--conquered commercial strongholds[148].

131 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 69 ff.

132 *Id.*

133 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 63.

134 *Id.*

135 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 69 ff.

136 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 63.

137 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 69 ff.

138 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 63.

139 Charles Ralph Boxer, *Fidalgos no Extremo Oriente*, *cit.*,: 12 ff.

140 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 69 ff.

141 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 62-63.

142 António Manuel Hespanha, Panorama *da História Institucional e Jurídica de Macau*, *cit.*: 69 ff.

143 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 62-63.

144 Charles Ralph Boxer, *Fidalgos no Extremo Oriente*, *cit.*,: 12 ff.

145 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 69 ff.

146 The far-reaching extent of *Capitão-Mor de Viagem da China e do Japão´s* powers (which not only entailed administration of justice but extended also to law enforcement) can be gauged by this excerpt in Portuguese language: «os capitães das naus ou frotas reais ou de navios privados, enquanto pessoas encarregues da direcção da frota ou do navio, tinham poderes jurisdicionais, sendo-lhes permitido o uso de medidas coercivas. Os capitães de frota detinham ainda poderes conferidos no seu regimento»; António Manuel Hespanha, *Panorama Histórico do Direito Chinês. O Pensamento Jurídico*, *cit.*: 71; See: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 63.

147 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 62-63.

148 *Id.*

Exerting judicial powers and administrating justice in Portuguese domains, strongholds, and colonies in the Far East fell well within *Capitão-Mor de Viagem da China e do Japão´s* jurisdiction[149]. This prestigious role derived from Portuguese Ordinations[150] (enacted during the long-lasting Epoch of Ordinances, whose majestic influence traversed a long-winded span of time from 16 th century to 19 th century), which have awarded sizeable powers to Captains of Cities of Africa (*Capitães dos Lugares de África*)[151].

As hinted above, at the *two-layered law and social reality* level, Ordinations (*Ordenações*) were fully applicable in Macau from 1557 onwards to either Portuguese citizens or Chinese newly-converted to Christianity[152] (*cristãos novos*)[153]. In sum, at the administration of justice level[154], *Capitão-Mor de Viagem da China e do Japão´s* task[155] in Macau[156] was not circumscribed to dealing with every-day issues related to Portuguese citizens. Rather, it also encompassed overseeing and exerting the administration of justice in Macau to either Portuguese citizens or Chinese newly-converted to Christianity (*cristãos novos*).

As emphasized earlier in this section, *Capitão-Mor de Viagem da China e do Japão´s* broad-scope judicial powers [157] in Macau[158] comprised the administration of justice in Macau[159] to either Portuguese citizens or Chinese newly-converted to Christianity (*cristãos novos*)[160]. Chinese citizens non-converted to Christianity fell under the jurisdiction of Chinese Officials[161/162] named *mandarins*[163/164]. As previously asserted, the exis-

149 *Id.*

150 *Id.*

151 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 71 ff.

152 *Id.*

153 *Capitão-Mor de Viagem da China e do Japão´s* jurisdiction (which, as mentioned, not only comprised the administration of justice but extended also to law enforcement) can be also ascertained by this excerpt in Portuguese language: «Portanto, era ao Capitão-Mor que cabia, durante os intervalos das suas viagens (isto é, enquanto esperava pelos ventos de monção para prosseguir viagem até ao Japão) dirigir os assuntos dos portugueses em Macau e administrar a justiça»; see: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 63.

154 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 71 ff. See also: Rosemarie Wank-Nolasco Lamas, *History of Macau – A student´s manual*, *cit.*: 18 ff.

155 C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 58 ff.

156 Charles Ralph Boxer, *Fidalgos no Extremo Oriente*, *cit.*,: 12 ff.

157 C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 58 ff.

158 Charles Ralph Boxer, *Fidalgos no Extremo Oriente*, *cit.*: 12 ff.

159 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 63.

160 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 71 ff.

161 C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 58 ff.

162 See Rosemarie Wank-Nolasco Lamas, *History of Macau – A student´s manual*, *cit.*: 18 ff.

163 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 63.

164 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 71 ff.

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tence of a pristine Confucianism normative system[165] comprising norms of rites («*Li*») coupled with customary practices[166/167] pervaded this area (China and Macau) for over 2000 years in China´s millenary imperial history[168/169].

Against this background, it would hardly amount to a figment of a bewildering imagination to assert that *Capitão-Mor de Viagem da China e do Japão* wielded an astounding judicial power in Macau back then[170]. The width of his judicial powers is self-explanatory: *Capitão-Mor de Viagem da China e do Japão* was responsible for trialling a host of crimes and misdemeanours in last instance[171]. Exceptions were made to either crimes to which death penalty could be applied or crimes perpetrated by aristocrats[172]. Cases in which regional security was in jeopardy would also fall outside the remit of *Capitão-Mor de Viagem da China e do Japão´s* jurisdiction. In such cases, *Capitão-Mor de Viagem da China e do Japão* lacked judicial power to trial such cases[173].

In such cases, appeals were to be made to the Court of Second Instance of Goa (India) to which *Capitão-Mor de Viagem da China e do Japão* was hierarchically subordinated[174]. Further to a copious social outcry and widespread dissatisfaction with the administration of justice[175], *Capitão-Mor de Viagem da China e do Japão´s* role was

165 *Id.*

166 Zh. P. Liang, *Customary law in Qing Dynasty: Society and State*, China, CUPL Press, (1996): 1 ff.

167 Hugh T. Scogin, Jr., Civil "Law" in Traditional China: History and Theory", *Civil Law in Qing and Republican China*, *cit.*: 28 ff (on the paramount importance of this set of norms of rites and customary practices in China Imperial legal history).

168 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 289.

169 In Portuguese doctrine, António Manuel Hespanha, *Panorama Histórico do Direito Chinês. O Pensamento Jurídico*, *cit.*: 8 ff.

170 See Second Paper, Title XXVIII, Prologue and First Paragraph, Ordenações Manuelinas, available at: http:www1.ci.uc.pt/ihti/proj/manuelinas/12p138.htm. (access: 1.07.2023).

171 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 63.

172 *Id.*

173 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 68 ff.

174 *Id.*

175 Portrayed in the following excerpt in Portuguese: «Pouco depois da ascensão ao trono de Filipe II (I de Portugal), perante o descontentamento generalizado na administração da justiça, este encarregou uma comissão para averiguar e solucionar os problemas relativos à aplicação da justiça. O resultado dessas averiguações foi a Lei da Reformação da Justiça, em 28 de Julho de 1582, que, nas palavras de Cândido Mendes de Almeida, era "por si só um Código de Processo Civil e Criminal", onde, basicamente, se tratava do procedimento nos vários tribunais, dos recursos, entre outras matérias processuais. Também durante o reinado de Filipe I procedeu-se à reforma das Ordenações Manuelinas, as quais deram lugar às Ordenações Filipinas. No que toca aos poderes jurisdicionais dos Capitães-Mores, na época das Ordenações Filipinas, pouco ou nada mudou, acrescentando-se, porém, que não caberia recurso dos casos que julgassem a traição, sodomia, roubo e furto em navio (*Título XLVIII, Livro 2, número 1*), e, desde que não contrariassem as disposições das Ordenações, o Capitão podia aplicar as "Cartas ou Regimentos que lhes fôr outorgado" (número 2) entre outras alterações». See: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*, 64, whose stellar research I have been following closely.

abolished in 1623[176]. General Chief Captain (*Capitão-Geral*), an eminent military role with ties to the Civil Governor (*Governador Civil*) role, followed suit[177].

Standing in stark contrast with the *second layer of law and social reality*, at the *first layer of law and social reality* there was a bespoke system of administration of justice to Chinese citizens non-converted to Christianity. Such justice would be served to the latter according to pristine Confucianism normative system comprising norms of rites («Li») coupled with customary practices[178]. A (vivid) portray of a (vibrant) millenary culture.

A millenary culture that was deeply steeped in Macau´s backbone way before the «arrival of the birds» (the Portuguese) in 1513. Hence the expression *cultural originalism*. Whose main cultural traits (a Confucian-beliefs-based one) remained unscathed in Macau ever since.

With this backdrop in mind, the traits of a *two-layered cultural originalism* have begun to blossom in Macau as far back as 1557. This phenomenon was enabled by the jurisdiction-bifurcation of Portuguese citizens or Chinese newly-converted to Christianity (*cristãos novos*) that were to fall under the jurisdiction of Portuguese Law and Chinese citizens non-converted to Christianity that were to fall under the jurisdiction of Chinese Confucianism normative system. This normative system («Rites») was applied concomitantly and seamlessly with millenary customary practices under the guidance and tutelage of Chinese *mandarins*[179]. Solving disputes through conciliatory means (including Mediation)[180] was an important part of it. To a certain extent, a *two-layered*

176 *Id.* at 63.

177 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: *passim*.

178 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 289. See also: Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 628 ff.

179 *Id.*

180 See: Peter Chi Hin Chan, "Dispute Resolution under the Belt and Road Initiative: Constructing an Effective Mediation Regime in the Guangdong-Hong Kong-Macau Bay Area," *Asian Dispute Review*, 125-130, July 2018; Peter Chi Hin Chan, "Civil Mediation in Imperial, Republican and Modern-day China: Historical and Cultural Norms under the Traditional Chinese Legal Order," *The Legal History Review* (*Tijdschrift voor Rechtsgeschiedenis*) 85, 577-602, 2017, Peter Chi Hin Chan, "China's Grand Mediation Strategy for Social Stability: A Study on Out-of-Court Mediation Procedures," *Revista de Processo Comparado* 6(3), 81-111, 2017; "A Distorted Mediation Landscape: Judicial Mediation in the Chinese Civil Courts," *Nederlands-vlaams Tijdschrift voor Mediation en Conflictmanagement* (TMD) [Dutch-Flemish Journal for Mediation and Conflict Management] 20(3), 6-18, 2016; Peter Chi Hin Chan, "An Uphill Battle: How China's Obsession with Social Stability is Blocking Judicial Reform," *Judicature* 100(3), 14-23, 2016, Peter Chi Hin Chan, "OPCIONES DE MEDIACIÓN PARA RESOLVER DISPUTAS COMERCIALES EN CHINA" [Mediation Options for Resolving Commercial Disputes in China: A Guide for Foreign Enterprises], *Revista Chilena de Derecho* 41(1), 153-170, 2014 (in Spanish). Also published in *Tijdschrift voor Civiele Rechtspleging* 2, 49-56, 2012 (in English); Peter Chi Hin Chan, "The Enigma of Civil Justice in Imperial China: A Legal Historical Enquiry," *Maastricht Journal of European and Comparative Law* 19(2), 317-337, 2012; Efficiency and Truth in Civil Fact-finding: The Evolving Role of the Judge in Mainland China and Hong Kong and the Effect of the Policy Preference for Court Mediation on Fact-finding in the People's Courts," in C.H. van Rhee & Alan Uzelac eds., *Truth and Efficiency in Civil Litigation: Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context*, Antwerp: Intersentia, p. 231-260, 2012.

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law and social reality and a *two-layered cultural originalism* were deeply intertwined from the outset.

In a converging stance, it has been said that laws and customs (a set of cultural-based norms) were - and still are - inextricably intertwined in Imperial China and in a place known as Macau[181] nowadays[182]: «A long time ago, the place known as Macau nowadays was already inhabited by Chinese residents from the nearby regions. In the Ming Dynasty, when the Portuguese were allowed by local officials to settle, it was region governed by XiangShan County, Guangdong Province, where Chinese law applied. At the time, the legal system in force could be represented in *two levels*; *the written law of the Ming Empire*, and the *regional customs* of Guangdong Province and Xiangshan Country. The former mainly included a synthetic code titled "Ming Lü" (*Ming* Dynasty Code), which structure and content borrowed mainly from the Tang Lü (*Tang* Dynasty Code)».[183]

«In ancient China, just like many other ancient civilization, judicial and administrative functions were not performed separately. Some administrative powers were shared by the officials according to the Emperor´s delegation. However, the Emperor himself also reserved the legislative power. Official law always includes two main components, penal law and administrative law. The "unofficial" law was the customary law of the people, rules that developed in localities or in merchant guilds for handling of matters of common concerns. The magistrate could derive principles of civil law directly from provisions of the penal code or indirectly read into a criminal statute to excavate a basis for a private civil suit»[184].

Unlike Portuguese legality-driven and equality-driven bodies of laws, Chinese Confucian normative system´s «blood-stream» (in force in Macau prior the arrival of the Portuguese settlers) was undergirded by morality. Thus being morality-driven. Concerns about equality were neither pre-emptive nor mandatory: «Finally, in terms of spirit, the *Confucian view of law was always centred on morality*. Also, where a new piece of legislation was being considered, discretion would be used to assess its relationship to the existing law. *Equality before law was never officially accepted as a legal principle and a practice*. Besides, a person could not be convicted without a confession; torture was often used to elicit such a confession. In conclusion, before the Portuguese´ settlement in the middle of the 16 th century, Macau was ruled under a centralized monarchical hegemony similar to other parts of China. *The traditional Chinese legal culture was composed of a social-legal structure rooted in Confucianism and rulings of a monarchical hegemony*»[185]. Hence the expression (Chinese) *cultural originalism* at the first layer of law and social reality in Macau.

181 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 628 ff.

182 Liu Haiou, *Outline of the Macau Legal History*, China, Jilin University Press, (2009): 1-18.

183 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 628 ff (italics added).

184 *Id.*

185 *Id.*

4.1.1.3. The creation of the Senate of Macau (*Senado da Câmara*) (1583-1849): The beginning of an autonomous administrative path or the onset of the era of divide and conquer between Portuguese judicial actors?

At the purely administrative level, there were conspicuously clear signs that the Portuguese were seizing the opportunity to establishing their own city government in Macau[186]. Bearing that assertion very firmly in mind, Bishop D. Leandro de Sá (between 1583 to 1585)[187/188] has summoned all the prominent Portuguese citizens dwelling in Macau with a view to garner their attention about the organization and model of governance[189]. From that long-held deliberation emerged the *Senate* (*Senado da Câmara*)[190/191], which was officially recognized in 1586 by the Vice-King of India (*Vice-Rei da Índia*)[192/193].

The Senate had exquisite characteristics (better said: an abnormal wide range of powers) ranging from purely administrative powers to eminently judiciary ones[194]. From a certain span of time onwards (depending on the exact date of Senate´s creation in Macau)[195], there was a schizophrenic coexistence between *Capitão-Mor de Viagem da China e do Japão* (and thereafter his functional heir *Capitão-Geral*) and *Senado da Câmara*. Functional coincidence which has led to constant strife between both ends. Eventually, such an acrimonious war turf would prove dreadful to the trustworthiness of both thus prompting their disbandment.

186 *Id.* at 630.

187 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 64.

188 There are neither iron-clad (let alone air-tight) certainties regarding the exact dates of Senate´s creation nor regarding its founding fathers. Some glaringly different historical accounts (sometimes from the same author) have surfaced. Some historical reports stated that *Senado* was created in 1583 under the auspices of Bishop D. Belchior Carneiro (or Melchior Carneiro for some authors). Some historical accounts asserted that were instead the Portuguese traders the founding fathers of the Senate back in 1562. See: Luís Gonzaga Gonçalves, "Leal Senado da Câmara de Macau", *Macau – Um Município com História*, António Aresta/Celina Veiga de Oliveira, Macau, Edição do Leal Senado, (1997): 13 ff; Luís Gonzaga Gonçalves, "O Município Macaense", *Macau – Um Município com História*, António Aresta/Celina Veiga de Oliveira, Macau, Edição do Leal Senado, (1997): 43-45; Luís Gonzaga Gonçalves, "Os inícios da cidade de Macau", *Macau – Um Município com História*, António Aresta/Celina Veiga de Oliveira, Macau, Edição do Leal Senado, (1997): 106 ff; Converging: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 64-65.

189 *Id.* at 64.

190 In the Portuguese doctrine, António Aresta/Celina Veiga de Oliveira, *O Senado -Fontes Documentais para a História do Leal Senado*, Macau, Edição do Leal Senado, (1998): 18 ff.

191 C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 53 ff. (Asseverating that Senate´s creation can be traced as far back as 1583 further the initiative of Bishop D. Belchior Carneiro).

192 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 64.

193 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 75 ff.

194 *Id.*

195 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 64.

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The Senate had functional jurisdiction over criminal and civil matters[196] regarding Portuguese citizens and Chinese converted to Christianity residing in Macau. Two judges were functionally linked to the Senate exerting their powers as for trialling and sentencing both criminal and civil cases[197]. Just like *Capitão-Mor de Viagem da China e do Japão´s* (and thereafter his functional heir *Capitão-Geral*), appeals from Senate´s judges were to be made to either the Chief Justice (*Ouvidor*) or the Court of Second Instance of Goa[198] (India).[199]

Besides, Senate had a cohort of Peace Judges (*Juízes de Paz*)[200]. Unlike judges, their roles were not driven by strict-legality concerns. In a certain way, *Juízes de Paz* sprang into action a (non-nugatory piece of) administration of justice underpinned by quasi-conciliatory means. Yet, conspicuously far from mediation canons though.

Amidst a vast array of administrative reforms undertaken by the Portuguese politician Mouzinho da Silveira, *Senado da Câmara* was partially expunged somewhere in the middle of the XIX century[201]. Never-ending functional clashes with *Capitão-Mor de Viagem da China e do Japão* (alongside staggering reputational damages inflicted upon both their functional integrity) hastened such a predictable outcome. Thereafter, *Senado da Câmara´s* jurisdiction[202] got severely constrained as it was circumscribed to dealing with merely administrative[203] matters[204].

Senado da Câmara was later renamed as Loyal Senate (*Leal Senado*). Somewhere in the first quarter of the XVIII (1720), *Leal Senado* regained judicial powers. Thus rekindling the acetous feuds and war turfs amongst Portuguese administration of justice organs[205]. More on this at the following sub-chapters.

4.1.1.4. The creation of the Procurate of Macau (Procurador) (1584): The beginning of an era of Sino-Portuguese judicial network cooperation: Two sides of the same coin or two coins instead?

At the outset of this section one must emphasize that the Portuguese never acted as conquerors[206] or undisputed rulers in Macau[207]. Instead, they have carefully customized

196 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 55 ff.

197 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 64.

198 *Id.*

199 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 55 ff.

200 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 65.

201 *Id.*

202 António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, *cit.*: 55 ff.

203 *Id.*

204 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 65.

205 *Id.*

206 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 290 ff.

207 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 630 ff.

a «picturesque» image of mere traders or (ephemeral?) visitors[208]. This image punctiliously crafted by the Portuguese settlers would eventually yield tangible results. It conveyed to the outer world an image of western-people-amenable-to-living-in-the--Far-East. This bespoke image might have progressively eroded the resistance of the Chinese in regards of the presence of the Portuguese in Macau. Furthermore: not only decreased acrimony (if any) between both communities, but also boosted (to a certain extent) social cooperation between them thereafter. A clear-cut (and rather perspicuous) sign of that was the increase of Portuguese settlers that began to come-and--dwell in Macau[209]. This was a hint that the harmless image of mere traders and visitors conveyed by the Portuguese settlers eventually bore fruits.

At the very end of the XVI century, there were diaphanous signs that the initial mistrust between both communities was being increasingly dispelled. As adduced by illustrious doctrine: «gradually, it seems a kind of balance or harmony was established between the Chinese government and the Portuguese community in Macau».[210]

A seemingly harmonious relationship between Chinese authorities and Portuguese rulers gave rise to an era of unprecedented *judicial network cooperation*. With this backdrop in mind, the Procurate (*Procurador*) was created by the Portuguese community in 1584[211]. *Procurador´s* task was to act as a kind-of liaison official (thus an intermediary)[212] between local authorities, Chinese Imperial government, and the Provincial Government of Canton (*Governo Provincial de Cantão*)[213].

Procurador´s creation was not a sole and square «invention» of the Portuguese community though. Rather, it has received local Chinese acquiescence. Likewise, *Procurador* has been officially endorsed by the Chinese Emperor in 1584 as a second rank Mandarin officer (*Mandarim de Segundo Grau*). This nomination was aimed at fostering social connections between the Portuguese community and the Chinese community. *Procurador* thus served as an intermediary between the Portuguese community and the Provincial Government of Canton (*Governo Provincial de Cantão*)[214].

This newly-created position (*Procurador*) has heralded a new era in the institutional and legal relationship between Portuguese local authorities and Chinese Imperial

208 *Id.*

209 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*, *passim*. See also: Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*, *passim*; Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit., passim*.

210 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 630.

211 C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 55 ff.

212 Aureliano Campino da Rosa Barata, "Procuratura do Expediente Sínico", *Ditema – Dicionário Temático de Macau*, Vol. IV, Leonor Diaz Seabra/António Rodrigues Baptista (Coordenação), Macau, Faculdade de Ciências Sociais e Humanas, Departamento de Português, Universidade de Macau editora, (2011): 1245 ff.

213 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 65.

214 *Id.*

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Government. Although maintaining markedly different layers of *law and social reality* and keeping untouched their respective *cultural originalism*[215], Chinese authorities ascribed jurisdiction to the *Procurador* to trial Chinese citizens non-converted to Christianity[216] nonetheless. Amongst these newly-assigned judicial powers to the *Procurador* stood the right to expel Chinese citizens non-converted to Christianity if they posed an eminent threat to public order[217].

Additionally, *Procurador* was entitled to hold informal hearings and entertaining complaints from the Chinese community against Portuguese citizens and vice-versa[218]. Although this was not clearly an administration of justice through conciliatory means (let alone mediation)[219], one cannot fail to see a glimpse of it.

Besides the afore-known jurisdiction and judicial powers attributed by the Chinese Imperial Government[220], *Procurador´s* powers also comprised trialling and sentencing misdemeanours perpetrated by Chinese citizens non-converted to Christianity[221]. Such misdemeanours were immediately trialled and sentenced by the *Procurador*[222]. *Procurador* had also jurisdiction[223] over felonies (such as battery and robbery) perpetrated by Chinese[224] citizens non-converted to Christianity in which Portuguese citizens were the aggrieved parties[225]. In such cases (felonies)[226], Procurador held preliminary hearings under oath[227].

215 See Point 5. to point 5.2. of this paper (on China´s and Macau´s cultural originalism to solve disputes through amicable means on the heels of Confucianism with a view to both grasp social harmony and foster a biddable and long-lasting relationship).

216 C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 57 ff.

217 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66.

218 Aureliano Campino da Rosa Barata, "Procuratura do Expediente Sínico", *Ditema – Dicionário Temático de Macau*, *cit.*, 1245 ff.

219 The doctrine affords some importance to the *Juízes de Paz* in this regard. See: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66; Aureliano Campino da Rosa Barata, "Procuratura do Expediente Sínico", *Ditema – Dicionário Temático de Macau*, *cit.*, 1245 ff.

220 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 136 ff.

221 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66.

222 *Id.*

223 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

224 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66.

225 *Id.*

226 Aureliano Campino da Rosa Barata, "Procuratura do Expediente Sínico", *Ditema – Dicionário Temático de Macau*, *cit.*, 1245 ff.

227 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66.

Subsequently, Chinese citizens non-converted to Christianity who had committed felonies were to be, would be, handed over to a Chinese magistrate in Canton[228] to be trialled and sentenced[229]. Whenever a murder occurred, Chinese citizens non-converted to Christianity would be immediately arrested by the *Procurador*[230]. Thereafter, Chinese *Mandarins* (officials that applied Chinese law and customs)[231] would come along to Macau to process the corpse[232]. At the same time, the Chinese defendant would be sent over to Canton[233] for trial and, should that be the case, execution[234].

It would be unwise - and ultimately inaccurate - to assert that the *two-layered law and social reality* (which has pervaded Macau legal history) was dispelled in «thin air» though. I would deem this period as a *Sino-Portuguese judicial network cooperation*. With slight nuances, Portuguese law was still applied to both Portuguese and to Chinese converted to Christianity. Chinese law was still applied to Chinese non-converted to Christianity. In this vein, there were two coins instead of two sides of the same coin. This conclusion will be reinforced in the following sections.

4.1.1.5. The creation of the Chief Justice of Macau (*Ouvidor*) (1587-1720): One more judicial actor to fuel the tension between *Capitão-Mor de Viagem da China e do Japão, Leal Senado and the Procurador*?

Whilst is not certain the exact date in which the Chief Justice´s (*Ouvidor*) was created[235], one can set forth the date of 16th of February of 1587[236]. As adduced by the Portuguese doctrine, this date has signalled the enactment of a paramount *Regiment*

228 Aureliano Campino da Rosa Barata, "Procuratura do Expediente Sínico", *Ditema – Dicionário Temático de Macau*, *cit.*, 1245 ff.

229 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

230 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66.

231 Aureliano Campino da Rosa Barata, "Procuratura do Expediente Sínico", *Ditema – Dicionário Temático de Macau*, *cit.*, 1245 ff.

232 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66.

233 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

234 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66.

235 See in the Portuguese doctrine, Carla Araújo, "Ouvidor", *Ditema – Dicionário Temático de Macau*, Leonor Diaz Seabra/António Rodrigues Baptista (Coordenação), Faculdade de Ciências Sociais e Humanas, Departamento de Português, Macau, Edição da Universidade de Macau, Vol. IV, (2011): 1097 ff. Converging: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*

236 See in the Portuguese historical archive, "Regime da Reiação, e Ministros da Justiça da India, Titolo do regimento do Ouvidor de Macáo nas partes da China", *Archivo Portuguez Oriental*, fascículo 5.º, 3ª parte, Lisboa, Imprensa Nacional Casa da Moeda, (1866): 1143 ff. Converging: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*

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(*Regimento*)[237]. Such *Regimento* of 16th of February of 1587 has symbolically marked the outset of *Ouvidor´s*[238] tenure in the administration of justice of Macau[239]. This *Regimento* has been enacted pursuant a bevy of administrative and judicial reforms[240] undertaken on Portuguese colonies in East Africa Coast and Far East[241].

Ouvidor´s main tasks boiled down to assisting the *Capitão-Mor de Viagem da China e do Japão* in administrating justice in Macau at the second layer of law and social reality. Namely, preparing all the cases, trialling (as *Capitão-Mor de Viagem da China e do Japão´*s assistant)[242] criminal and civil suits and signing[243], alongside the former, all the decisions that were made during their tenure[244].

Ouvidor´s jurisdiction was rather broad. He had jurisdiction to trial all criminal and civil cases (pursuant art.º 1 of the Regiment of Macau´s *Ouvidor* in China)[245]. Additionally, *Ouvidor* had jurisdiction to trial, in last instance, all civil and criminal cases that fell within *Capitão-Mor de Viagem da China e do Japão* jurisdiction[246] (pursuant the jurisdiction outlined on Paper 2, Title 47, of Filipine Ordinations)[247]. In such cases, their decisions were not appealable to the Second Instance Court of Goa (India)[248].

Pursuant IV Regiment of Macau´s *Ouvidor* in China, *Ouvidor* had the duty to prepare and trial all the criminal cases[249]. As soon as all the preliminary hearings and proceedings were finished, *Ouvidor* had the incumbency to inform *Capitão-Mor de Viagem da China e do Japão* accordingly[250]*.* Further this formal notice*,* the latter would schedule a date for trial[251]. Pursuant IV Regiment of Macau´s *Ouvidor* in China, *Ouvidor* had the duty to write down the decision which would close the case. Such a decision needed to be signed by the *Ouvidor* and the *Capitão-Mor de Viagem da China e do Japão*[252.]

237 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

238 *Id.*

239 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

240 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

241 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

242 Carla Araújo, "Ouvidor", *cit.*: 1097 ff.

243 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff and passim, whose research I have been following very closely.

244 Carla Araújo, "Ouvidor", *cit.*: 1097 ff.

245 *Id.*

246 *Id.*

247 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

248 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

249 Carla Araújo, "Ouvidor", *cit.*: 1097 ff.

250 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

251 *Id.*

252 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

In case of dissension between *Ouvidor* and *Capitão-Mor de Viagem da China e do Japão,* a consensus could not be reached. Conversely, a decision would not be issued[253]. In such cases, the oldest council member (*alderman*) working in *Senado da Câmara*[254] would be summoned. Such council member would be entitled to have a quality vote to untie the standoff. Further a new round, if a majority had been reached, the decision was to be written down mirroring the newly-reached majority.[255]

Should the *Capitão-Mor de Viagem da China e do Japão* be unavailable (or travelling across other Portuguese colonies or commercial strongholds)[256], the *Ouvidor* had the incumbency to trial and sentencing all criminal cases that fell under its jurisdiction as if the *Capitão-Mor de Viagem da China e do Japão* was present (pursuant VI Regiment of Macau´s *Ouvidor* in China)[257].

Ouvidor[258] had the incumbency to trial and sentencing all criminal cases[259] that fell within its jurisdiction[260] (being that those crimes to which the dead penalty would be applicable provided the defendant was a layperson (*peão*)[261]. Should the defendant be a noble or aristocrat[262], prior to reaching a decision or to its enforcement (should that be the case), a binding opinion would be requested to the highest echelon of justice in Macau – Court of Second Instance of Goa (India) (*Tribunal da Relação de Goa*)[263].

Mirroring a *two-layered law and social reality* in Macau, *Ouvidor* was forbidden to exert its jurisdiction over Chinese-non-converted to Christianity[264]. However, further an

253 Carla Araújo, "Ouvidor", *cit.*: 1097 ff.

254 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

255 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

256 Carla Araújo, "Ouvidor", *cit.*: 1097 ff.

257 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

258 In the Portuguese doctrine, António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, Macau, Fundação Macau, (1995): 29-47 (stating that, in principle, Portuguese law was to be applied to all Christians regardless of their nationality).

259 Carla Araújo, "Ouvidor", *cit.*: 1097 ff.

260 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

261 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

262 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

263 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

264 *Id.* The very same remarks (though in slightly different direction when it comes to the date of *Ouvidor´s* creation and the extent and width of its jurisdiction) have been made by esteemed doctrine as follows: «When the number of Portuguese settlers began to grow, they started organizing their own political and municipal unit, the *Senado* (Senate). This was accompanied by the influence of Portuguese law and legal institutions. For example, the regime of *Ouvidor* (Chief Justice) was established almost as soon as the Portuguese community was settled in Macau. In 1642, they already had installed their institution of a Notary. It is quite obvious that from the middle of the 16 th century to the middle of the 19 th century, Portuguese law was applied in Macau, though beliefs differ about the extent of this legal influence»; Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*: 291.

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ongoing trend of *Sino-Portuguese judicial network cooperation* (initiated with *Procurador´s* creation)[265], *Ouvidor* had full jurisdiction over cases of mixed jurisdiction[266] (which involved both Chinese non-converted to Christianity and Portuguese or Chinese converted to Christianity)[267]. Nonetheless, if a Chinese non-converted to Christianity was murdered, Chinese *Mandarins* would be summoned to join the case[268] to co-decide it[269].

With this backdrop in mind, it is not difficult to grasp the vivid impression that strife, feuds, and war turfs were constant between a wide range of Portuguese judicial actors in Macau[270] (concretely: *Procurador, Ouvidor*, *Capitão-Mor de Viagem da China e do Japão* and *Leal Senado*)[271]. Thus leading to a widespread dissatisfaction and disrepute of the Portuguese organs of administration of justice[272]. Further this widespread dismay, *Ouvidoria* de Macau has been disbanded pursuant King´s dispatch (*Carta Régia*) issued in 1720[273]. *Leal Senado* (formerly known as *Senado da Câmara*) followed suit. Ouvidor´s jurisdiction has been transferred to the newly-appointed municipal judges (*juízes concelhios*) working therein[274].

4.1.1.6. A temporary suppression of the two-layered law and social reality (1743-1804): The Creation of White House Mandarin (*Mandarim da Casa Branca*) and the temporary reinstatement of Chinese Penal Code in Macau

At this stage it seems clear that there was a *two-layered law and social reality* in Macau between the middle of the 16 th century and roughly the middle of 19 th century. Despite an ongoing *Sino-Portuguese judicial network cooperation*, this assumption is not to be brushed aside. This two-layered legal reality stems from another assertion: no serious doubts can be cast upon the fullest extent of China´s sovereignty over Macau in that span of time.

The very creation (and the proliferation)[275] of the *Sino-Portuguese judicial network cooperation* was a byproduct of an ongoing judicial and administrative tolerance

265 Carla Araújo, "Ouvidor", *cit.*: 1097 ff.

266 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

267 *Id.*

268 Carla Araújo, "Ouvidor", *cit.*: 1097 ff.

269 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

270 Carla Araújo, "Ouvidor", *cit.*: *passim*.

271 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

272 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 137 ff.

273 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 66 ff.

274 *Id.*

275 One should bear in mind that the Sino-Portuguese judicial network cooperation started with the judicial cooperation with the *Procurador* and yet have been extended to the *Ouvidor* shortly after.

(again)[276] from Chinese authorities towards the Portuguese[277], rather than a full manifestation of sovereignty from Portuguese judicial authorities[278] over Chinese-non-converted to Christianity. Which means that the Chinese would resume full judicial sovereignty and jurisdiction[279] (as a figure of speech as, in this period, they have never lost track of it)[280] whenever they saw socially fit[281/282]. Overall, this two-layered law and social reality was reasonably functional though[283].

However, signs of a temporary suppression of the two-layered law and social reality were looming large. At a certain span of time (from 1743 until roughly 1803), further the ceaseless strife and war turfs between Portuguese organs of administration of justice[284], Chinese judicial organs were gathering pace when it comes to extending the

276 Every now and then this fact (Chinese judicial and administrative tolerance towards the Portuguese) was reminded to the latter even in official occasions. The clear message was (as stated at the outset of this subchapter) Portuguese should govern themselves and show a lenient and obedient stance towards the Chinese as no sovereignty over Macau had been given to them by the Chinese Emperor: «mal assumiu o cargo de vice-rei de Cantão, em 1582, mandou que se apresentassem as principais autoridades civis, legais e eclesiásticas de Macau para que lhe fosse explicado por que direitos governavam a colónia, porque, alegava ele, o imperador, ao dar-lhes Macau, não lhes outorgava qualquer jurisdição sobre o território (….) *Como se esperava, não havia necessidade de mais justificações. Que os portugueses permaneçam em Macau, bons e leais amigos, disse o vice-rei, que se governem a si mesmos como até aqui e obedeçam aos mandarins*»; (italics added); See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 52 ff. *Apud*, João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 70 ff and passim.

277 See João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 70 ff (no direct mention to a ongoing Sino-Portuguese judicial network cooperation has been done though).

278 A full height of administrative and judicial sovereignty which was demographically impossible and utterly unfeasible given the imbalance between Chinese and Portuguese respective population back then: «Os Chinas nesta cidade são perto de 22.000, e todos os cristãos assim velhos como moços e crianças de peito (….) não chegarão a 6.000»; Charles Ralph Boxer, *Estudos para a História de Macau – Séculos XVI a XVIII*, 1.º Tomo, 1ª edição, Macau, Edição Fundação Oriente, (1991): 182 ff.

279 A fairly good example is an historical report portraying that (in 1644, further a social unrest that led to the overthrow of the Ming Dynasty by the Manchu Dynasty) the Emperor has issued an Imperial decree stating that the Chinese citizens non-converted to Christianity were forced to move back to the interior Mainland China (towards Canton) in order to avoid any contacts with aliens or westerns. This measure was mainly aimed at preventing any strike back attempts to restore Ming Dynasty in China. Likewise, this measure clearly shows that until then (1644) Chinese Emperors always considered Macau as a part of China, administered by the Portuguese and within the boundaries drawn by the Chinese; See: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 70 ff; See also: Charles Ralph Boxer, *Estudos para a História de Macau – Séculos XVI a XVIII*, *cit.*: 182 ff.

280 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 630 ff.

281 In spite of seemingly good institutional relationship between Chinese authorities and Portuguese authorities, there are some historical accounts depicting a sort-of episodic disarray between both ends; See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 57 ff.

282 See also, in the Portuguese doctrine, A. M. Martins do Vale, *Os Portugueses em Macau (1750-1800) – Degredados, ignorantes ou fiéis vassalos d´El-Rei?*, 1ª edição, Macau/Lisboa, Instituto Português do Oriente, (1997): 68 ff.

283 In Portuguese language, Charles Ralph Boxer, *Estudos para a História de Macau – Séculos XVI a XVIII*, *cit.* 181 ff.

284 A. M. Martins do Vale, *Os Portugueses em Macau (1750-1800) – Degredados, ignorantes ou fiéis vassalos d´El-Rei?*, *cit.*: 68 ff.

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application of Chinese law to all Macau´s residents (including Portuguese and Chinese converted to Christianity). With this backdrop in mind, the White House Mandarin (*Mandarim da Casa Branca*)[285] or Sub-Branch of White House (*Sub-prefeitura da Casa Branca*) has been created. *Mandarim da Casa Branca* was aimed at overseeing all the subjects related to both Chinese and Portuguese (irrespective of their religion) and to prevent banditism within Macau´s boundaries[286].

This situation (that lasted for 60 years or so) has reached its full height in 1774 with the sole (and square) application of the Chinese Penal Code (*Código Penal Chinês*) to all Macau´s residents[287] (irrespective of their religion or nationality)[288]. This temporary suspension of the Portuguese law (and inherently the suspension of the *two-layered law and social reality*, which had been in force in Macau since 1557) was allegedly due the assassination of a Chinese non-converted to Christianity perpetrated by a Portuguese citizen[289].

Additionally, the thrust to showcase Chinese sovereignty over Macau in that span of time also encompassed displaying outdoors (both at *Mandarim da Casa Branca* and *Leal Senado*) containing excerpts of a series of Chinese laws[290] (better said: compilation). This reaffirmation of sovereignty was not only aimed at fortifying (by replenishing a Chinese body of laws in Macau) Qing´s Dynasty sovereignty over Macau, but also to clarifying and harmonizing the interpretation of conflicting bodies of laws (both Chinese and Portuguese)[291] – the dubbed *Twelve Chapters* (*Doze Capítulos*)[292].

4.1.1.6.1. Bidding farewell to the *two-layered law and social reality* (1803-1999) via the (unlikely) influence of French Illuminism? The inception of legal pollination which has prompted *legal dormants* and *cultural divergence with law* in Macau

It was not before long that the equilibrium in which the two-layered law and reality rested upon was reinstated in Macau. But not for long though. This time the imbalance tilted towards the other side of the scale. Further to the decaying of Qing Dynasty in China, the Portuguese seized the opportunity to «claim» sovereignty (at the very least, enhanced jurisdiction) over Macau. Like they were never able to do before. «Although Portuguese settlers did not colonize nor conquer Macau by force at the beginning, the harmonious

285 Jin Gouping, "Mandarim da Casa Branca", *Ditema – Dicionário Temático de Macau*, Leonor Diaz Seabra/António Rodrigues Baptista (Coordenação), Faculdade de Ciências Sociais e Humanas, Departamento de Português, Macau, Edição da Universidade de Macau, Vol. IV, (2011): 945 ff.

286 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 72 ff, whose research I have been following very closely.

287 See C. A. Montalto de Jesus, *Macau Histórico*, *cit.*: 135 ff.

288 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 72 ff.

289 *Id.*

290 A. M. Martins do Vale, *Os Portugueses em Macau (1750-1800) – Degredados, ignorantes ou fiéis vassalos d´El-Rei?*, *cit.*: 71 ff.

291 See Jin Guo Ping/Wu Zhiliang (Coordenação), "Verção de doze Capitolos", *Correspondência Oficial Trocada entre as Autoridades de Cantão e os Procuradores do Senado*, 1ª edição, Macau, Fundação Macau, (2000): 5 ff.

292 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 72 ff.

"*convívio*" among Chinese and Portuguese in this small island gradually lost its foundation as soon as the Qing government started decaying and falling in the late XVIII century»[293].

The inception of the so-called Portuguese-sovereignty-turn[294] over Macau[295] can be traced back to the enactment of Royal Provisions (*Providências Régias*) of D. Maria I of 1783[296]. Such *Providências Régias* resonated with, and were the encapsulation of, an unshakeable intention of claiming (yet very softly) sovereignty over Macau. As such: «Since the *Providências Régias* (Royal Provisions) of D. Maria I of 1783, the intention of Portugal claiming sovereignty over Macau became more and more clear. The Portuguese seizure of control over Macau started in the XIX century with the intervention of their Governor in all issues related to urban and rural administration of this "territory", and at the same time, claiming jurisdiction over the Chinese in and around Macau. In 1822 the Portuguese Constitution declared Macau an integral part of Portuguese territory (the first time Portugal claimed sovereignty over Macau); and in 1845 Portugal declared Macau a free port, challenging the Chinese right to levy and collect custom duties»[297].

Most of the Chinese scholars do not extol such a stance on the so-called Portuguese-sovereignty-turn over Macau though. Views on the width and extent of self-autonomy and self-governance allotted to foreign populations living in a Chinese land underpinned such a take[298]. But one thing is for sure: «As shown in history, the claim of sovereignty by Portugal in the late 19th century was a venture in international politics which turned controversial later. Chinese scholars refused this claim. According to the traditional Chinese political philosophy, it was normal that relevant organs of foreign societies governed the disputes within their own societies. Accordingly, the self-governance of a foreign population in a Chinese land in no way indicates a loss of sovereignty or loss of jurisdiction. It should however be noted that in Macau or even in the whole Chinese Empire of the 16th century, law was not consciously identified as a separate element, but instead, an expression of political, economic or military power. Who held sovereignty over Macau after the takeover remained a controversial issue for quite a long time. If not sovereignty, the kind of power held by the Portuguese government over Macau during that period became ambiguous»[299].

293 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*, 293.

294 Sometimes named as Legal and Political Anthropology of Portuguese Overseas Expansion (*Antropologia jurídico-política da expansão portuguesa*); António Manuel Hespanha, *Panorama Institucional e Jurídico de Macau*, Macau, Fundação Macau, (1995): 30-31.

295 See in the Portuguese doctrine, Mário Júlio Almeida Costa, *História do Direito Português*, Coimbra, Almedina, (1996): 157 ff (displaying nuanced historical accounts on this topic).

296 See Jorge Noronha e Silveira, *Subsídios para a História do Direito Constitucional de Macau*, 1820-1974, tradução por C.Y. Sam e H.F. Vong, Gabinete de Tradução Jurídica/ADAT, (1997): 30 ff (on Portugal´s increasing intention to claim sovereignty over Macau through the creation of Governor (*Governador*) in the XIX century).

297 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*, 293.

298 *Id.*

299 *Id.*

This sizzling hot topic falls well beyond the breadth and scope of this paper. Instead of focusing on the so-called sovereignty-turn over Macau, I will shift my attention to the impact that alleged Portuguese-sovereignty-turn had on the design of dispute resolution in Macau. The question then becomes to ascertain whether and to what extent has this convoluted period of Macau legal history impacted the equilibrium (or lack thereof) of the *two-layered law and social reality* in Macau. If so, to which degree the alleged Portuguese-sovereignty-turn (through the enactment of laws, policies, and other manifestation of jurisdiction alike such as the creation or rebirth of organs of administration of justice) prompted *legal dormants* and *cultural divergence with law* in Macau. It should not come as a surprise that French illuminist conceptions stood at the heart of the so-called Portuguese-sovereignty-turn over Macau. A close-range look at it is in order. A *law-in-context methodology* stands at its core[300].

From the *law-in-context standpoint*[301], back at the very end of the XVIII there was an unremitting stream of French illuminist conceptions (deeply soaked in State sovereignty-borne ideas) running through Europe and beyond. French´s illuminism overriding goal was overhauling men´s state-of-nature to a civil-State-nature to which the citizens were kindly invited to place their trust upon[302]. Creating a sought-after Social Pact between citizens and the State would not fall far behind.[303/304]

With this backdrop in mind, laws were a powerful manifestation of State´s *longa manus*. Laws were a natural expression of State´s sovereignty (a natural expression

300 See: point 2. to point 2.1. of this paper.

301 See: point 2. to point 2.1. of this paper.

302 In French language, «*De l'État civil. Ce passage de l'état de nature à l'état civil produit dans l'homme un changement très remarquable, en substituant dans sa conduite la justice à l'instinct, & donnant à ses actions la moralité qui leur manquait auparavant*. C'est alors seulement que la voix du devoir succédant à l'impulsion physique & le droit à l'appétit, l'homme qui jusque-là n'avoir regardé que lui-même, se voit forcé d'agir sur d'autres principes, & de consulter sa raison avant d'écouter ses penchants. Quoiqu'il se prive dans cet l'Etat de plusieurs avantages qu'il tient de la nature, il en regagne de si grands, ses facultés s'exercent & se développent, ses idées s'étendent, ses sentiments s'ennoblissent, son amé toute entière s'élève à tel point que, si les [209] abus de cette nouvelle condition ne le dégradaient souvent au-dessous de celle dont il est sorti, il devrait bénir sans cesse l'instant heureux qui l'en arracha pour jamais, & qui, d'un animal stupide & borné, fit un être intelligent & un homme»; See in French doctrine : Jean Jacques Rousseau, *Du Contrat Social, ou Principes du Droit Politique*, Bibliothèque publique et universitaire de Genève (première version); «Le manuscrit contenant la version définitive du Contrat social qui a été imprimée a disparu.» le Pléiade édition t. III, p.1866. Publication, Amsterdam, février-mars 1762, Marc Michel Rey, etc.; le Pléiade édition t. III, pp. 347-470, 1866-1874. == Du Peyrou/Moultou 1780-1789 quarto édition; t. I, (1782): 187-360 (italics added).

303 See : Jean Jacques Rousseau, *Du Contrat Social, ou Principes du Droit Politique*, *cit.*: 347-470, «*Du Pacte Social*. Je suppose les hommes parvenus à ce point où les obstacles qui nuisent à leur conservation dans l'état de nature, l'emportent par leur résistance, sur les forces que chaque individu peut employer pour se maintenir dans cet état. *Alors cet l'Etat primitif ne peut plus subsister*, & le genre-humain périrait s'il ne changeait de manière d'être. Or, comme les hommes ne peuvent engendrer de nouvelles forces, mais seulement unir & diriger celles qui existent, ils n'ont plus d'autre moyen pour se conserver, que de former par agrégation une somme de forces qui puisse l'emporter sur la résistance, de les mettre en jeu par un seul mobile, & de les faire agir de concert» (italics added).

304 In French doctrine, Émile Durkheim*, Montesquieu et Rousseau précurseurs de la sociologie*, Paris, Librairie Marcel Rivière, (1953): 18 ff (hailing both Montesquieu and Rousseau as Sociologys´s founding fathers).

of how things must be)[305]. Jurisdiction (exercised by the judicial power further the emergence of the principle of separation of powers crafted by the French philosopher Montesquieu[306], a concept albeit alien to Chinese Confucianism[307]), has not fallen far behind. Portugal has embraced such a political-philosophical stance[308].

Whilst such a stance has not entailed claiming direct sovereignty over Macau (a question that falls well outside the scope of this paper), it certainly meant that the Portuguese authorities were (at the very least) making staggering efforts to superimpose their side of the two-layered law and social reality. This approach prompted (though silently and imperceptibly) the emergence of my newly-crafted concept of *legal dormants* and *cultural divergence with law* in Macau, especially from the middle of the XIX century onwards. Both at the jurisdiction level and the enactment of laws level.

At the jurisdiction level, Portugal´s staggering efforts to superimpose their side (layer) of two-layered law and social reality were set in motion through the rebirth and reinstatement of Chief Justice (*Ouvidor*) (which was reinstated in 1787 and yet it was not until 1803 that its Regiment was issued[309] and ratified)[310]. One of the main novelties of this Regiment (*Regimento*) was that from 1803 onwards, *Ouvidor* had jurisdiction to trial criminal cases in which Chinese citizens non-converted to Christianity were murdered without the intervention of Chinese *mandarins*[311] (art.º VI of Alvará de Regimento do Ouvidor de 26 de Março de 1803).

Consistent with the above-mentioned paradigm shift, *Ouvidor* had also jurisdiction to trial both criminal and civil matters in which Chinese non-converted to Christianity were the aggrieved parties and the Portuguese the defendants[312] respectively (art.º

305 In French language, «*Les Lois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses*» (italics added); see in French doctrine, Montesquieu, *L´Esprit des Lois*, Une édition électronique réalisée à partir du livre Montesquieu, De l'esprit des lois (1758). (Texte de 1758, dernier état du texte revu par Montesquieu. L'orthographe a été modernisé et la ponctuation légèrement, mais non la graphie. Édition établie par Laurent Versini, professeur à la Sorbonne. Paris: Éditions Gallimard, 1995 (2 volumes: vol I: pp. 1 à 604 ; vol. II: pp. 605 à 1628.) Collection folio Essais.).

306 Several reviews of Montesquieu´s intellectual and republican legacy have been done throughout the history, see in French doctrine, C. Larrère, *Montesquieu republican? De interprétation universitaire pendant la III république*, XVIII siècle 21 (1989): 150-160; C. Nicolet, *Histoire, Nation, République*, Paris, Odile Jacob, (2000): 47-54.

307 See: Zhou Zhenjie, *Corporate Crime in China: History and Contemporary Debates*, New York, Routledge, (2015): 1-204 (passim) (88) (arguing that the Chinese judiciary «is quite different, if not completely different, from that in Western countries that have adopted the principle of separation of powers; it is more administrative than judicial in nature»).

308 In Portuguese doctrine, António Manuel Hespanha, *Panorama Institucional e Jurídico de Macau*, *cit*.: 53 ff.

309 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 75 ff.

310 See in Portuguese historical archive, Álvara de Regimento do Ouvidor de 26 de Março de 1803, available at http://legislacao-regia.parlamento.pt/V/1/11/24/ (access: 25.12.2018).

311 *Id.*

312 *Id.*

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XVIII of Alvará de Regimento do Ouvidor de 26 de Março de 1803). *Ouvidor´s* second life did not last long though. Pursuant a Decree of 7th of December of 1836[313], *Ouvidor* has been (once more) disbanded[314]. This time for good.

Another manifestation of the foregoing stance was the creation of Committee of Justice (*Junta de Justiça*)[315] in 1803, which had jurisdiction to trial in last instance all criminal cases related with both civilians and military officers[316]. If the case involved either the application of the death penalty or the death of Chinese non-converted to Christianity, the defendant would be entitled to appeal to the Second Instance Court of Goa[317] (India) (*Tribunal da Relação de Goa* (India).

Leveraging on the «new illuminist winds», which were sweeping across all Europe and beyond, Portugal inscribed in its Constitution that Macau was part of the United Kingdom of Portugal, Brazil and the Algarves[318] (*Reino Unido de Portugal, Brasil e dos Algarves*) (pursuant art.º 20/III of Portuguese Constitution of 1820).

Such historical event marked the outset of a movement of *legal pollination* (as opposed to legal transplants), which would overhaul Macau´s legal landscape forever.

Major social and legal changes followed suit in Macau: **i)** ground rent (*foro de chão*), which was being paid to the Chinese Imperial Government since 1573, was abolished in 1846[319/320]**; ii)** Governor Ferreira do Amaral occupied Taipa and Coloane in 1849[321] in a bid to expanding the tiny boundaries of Macau; **iii)** Chinese customs were temporarily extinct (yet they were reinstated in 1862)[322]**; iv)** more importantly, Chinese mandarins special jurisdiction[323] over Chinese-non-converted to Christianity was officially disbanded in 1849[324];

313 See in Portuguese historical archive, Decreto de 7 de Dezembro de 1836, available at http://legislacao-regia.parlamento.pt/V/1/16/88/ (access: 31.12.2018).

314 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 75 ff.

315 *Junta de Justiça* has been included in the first major judiciary reform of the overseas provinces situated in the Far-East (Macau) and Indian Sub-Continent (Goa, India) and Oceania (East Timor), which dates as far back as 1th December of 1866, See in Portuguese historical archive, Decreto de 1 de Dezembro de 1866, available at: http://legislacao-regia.parlamento.pt/V/1/41/90/ (access: 1.01.2019).

316 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 75 ff.

317 *Id.*

318 *Id.*

319 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 78 ff.

320 Tong Io Cheng, "Between Harmony and Turbulence: The evolution of Macau and Land Law in the "Colonial" and the "Post Colonial" Context", *cit.*

321 «In 1849, Governor Ferreira do Amaral took full control of Taipa and Coloane and jurisdiction of Qing Government over Chinese residents in Macau. Later on, the Treaty of Beijing let to a remarkable integration of Macau into the Portuguese constitutional and administrative system»; *Id.* at 294.

322 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 78 ff.

323 António Manuel Hespanha, *Panorama Institucional e Jurídico de Macau*, *cit*.: 55 ff.

324 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 78 ff.

v) Consistent with the overarching idea of Macau-as-a-part-of-Portugal, the Portuguese Penal Code of 1852, the Civil Code of 1867, the Civil Procedure Code of 1876 and Commercial Code of 1888[325], have been *extended* to all overseas provinces[326] (including Macau)[327]; **vi)** in 13th of August of 1862, a paramount Treaty of Friendship and Trade between China and Portugal has been signed thus granting to Macau a position akin to other Portuguese´s overseas provinces[328]; **vii)** further down on this road, 1th of December of 1887 was a hallmark in the legal history of Macau[329]: China has granted to Portugal a perpetual right to occupy Macau[330], provided Portugal would not transfer the inalienable right to occupy the Peninsula without China´s prior and express consent[331].

Such a set of drastic changes on the legal landscape of Macau sparked the outset of Portuguese «colonial domination» in Macau[332] and prompted the emergence of *legal dormants*[333] (as Chinese laws application were drastically curtailed) and *cultural divergence with law*[334] (as the Confucian normative system («Rites») and Chinese customary law system were slowly submerged by the ceaseless stream of Portuguese bodies of laws). To this day, they are both *sleeping beauties* in Macau´s legal landscape. This explains the reason behind the legal oblivion of mediation in Macau to this day. Such a legal oblivion is in dire need of quashing. To cater for that, some procedural nudges are needed to ensure the rebirth of mediation in Macau[335]. An innovative pre-suit court-connected mandatory mediation legal framework with an easy opt-out stands at the heart of it[336].

Though there was a thrust to centralize the administration of justice in Portuguese organs, that did not mean that Chinese-non-converted to Christianity were deprived from a special jurisdiction. Even though such special jurisdiction was exerted by

325 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 634 ff.

326 António Manuel Hespanha, *Panorama Institucional e Jurídico de Macau*, *cit*.: 55 ff.

327 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 78 ff.

328 *Id.*

329 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 634 ff.

330 António Manuel Hespanha, *Panorama Institucional e Jurídico de Macau*, *cit*.: 55 ff.

331 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 78 ff.

332 Z. L. Wu, *Macau Political System*, Macau, Macau Foundation, (1997): 88 ff. See also: Y. T. MI, *Macau Legal System and Continental Law Family*, Beijing, CUPL Press, (2010): 18 ff.

333 See: Point 6.2. to point 6.2.2.1. of this paper (on legal dormants).

334 See: Point 6.2. to point 6.3.2.1. of this paper (on cultural divergence with law).

335 See: Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation (Against the Background of a Narrative of Social Sub-systems in Everlasting Cross-Fertilization)*, Singapore/Beijing/Berlin/New York, Springer Nature, (2023): 1-217, which I will follow closely in this regard.

336 See: Hugo Luz dos Santos, A Prospective Court-Connected Mandatory Mediation Regime in Macau: A Brief Note, in: Peter Chi Hin Chan/C. H. van Rhee (Editors), Civil Case Management in the Twenty-First Century: Court Structures Still Matter, Beijing/Singapore, Springer Nature, (2021): 199-204.

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a Portuguese organ of administration of Justice, there was a reminiscence of a special jurisdiction: the *Procuratorate* (*Procurador*)[337], who was now hierarchically dependent on the *Governor of Macau* (concretely: *Secretariat of Govern of Macau*) and not functionally linked to the Leal Senate (*Leal Senado*) any further. This special jurisdiction to Chinese-non-converted to Christianity lasted from 1847 to 1877[338].

Between 1877 and 1894 some changes were made with regard to the creation of a special jurisdiction to Chinese-non-converted to Christianity. In 1877, the Procuratorate of Chinese Businesses (*Procuratura dos Negócios Sínicos*)[339] was created. In 1894, further a far-reaching groundswell of legal reforms undertaken on the Regiment of Administration of Justice of Ultramarine Provinces (*Regime da Administração da Justiça nas Províncias Ultramarinas*),[340] *Procuratura dos Negócios Sínicos* has been effaced from the legal landscape of Macau though[341]. *Procuratura dos Negócios Sínicos´s* judiciary incumbencies were to be transferred to a local Judge[342].

It was not until 1917 that an especial jurisdiction was re-created to the Chinese-non-converted to Christianity, further the Regiment´s of Special Court for Chinese (*Regimento do Tribunal Privativo dos Chinas*) and its subsequent promulgation by the Decree n.º 3:637, of 29th of November later published in Macau´s Official Bulletin[343]. Like its predecessor, *Procuratura dos Negócios Sínicos´s, Tribunal Privativo dos Chinas* did not last long. As a result, and further its disbandment, a Portuguese judge has been appointed to trial criminal and civil matters in which Chinese-non-converted to Christianity were either defendants or aggrieved parties[344].

337 Doubts about whether *Procurador* applied Chinese law or the Portuguese law persist to this day. The very same set of doubts were raised on whether and to what extent *Procurador* applied customary Chinese law; See: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 78 ff.; Converging: António Manuel Hespanha, *Panorama Institucional e Jurídico de Macau*, *cit*.: 55 ff.

338 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 78 ff.

339 See Portugal Historical Archive, Procuratorate´s Regiment of Chinese Businesses (*Procuratura dos Negócios Sínicos*), available at: http://legislacao-regia.parlamento.pt/V/1/75/124/ (access: 1.07.2023).

340 See Portugal Historical Archive, Regiment of Administration of Justice of Ultramarine Provinces (Regime da Administração da Justiça nas Províncias Ultramarinas) available at http://legislacao-regia.parlamento.pt/V/1/80//117/ (access: 1.07.2023).

341 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 81 ff.

342 *Id*.

343 Carla Araújo, "Tribunal Privativo dos Chinas de Macau (1917-1927)", *Ditema – Dicionário Temático de Macau*, vol. IV, Leonor Diaz Seabra/António Rodrigues Baptista (Coordenação), Faculdade de Ciências Sociais e Humanas, Departamento de Português, Macau, Universidade de Macau Editora. (2011): 1469 ff. João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 81 ff.

344 António Manuel Hespanha, *Panorama Institucional e Jurídico de Macau*, *cit*.: 65 ff. See also: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 81 ff.

Tribunal Privativo dos Chinas ended up sharing the very same fate of its predecessor *Procuratura dos Negócios Sínicos´s* as it was abolished by the Decree n.º 14 553, of 20th of October of 1927[345]. *Tribunal Privativo dos Chinas´s* demise marked the very end of special jurisdictions for Chinese-non-converted to Christianity in Macau[346]. Afterwards, all matters related with the Chinese community were entertained and trialled in common courts (*tribunais comuns*), except when family and successions matters were raised. In such cases, the Code of Chinese Uses and Customs in Macau of 1909 (*Código dos Usos e Costumes dos Chinas de Macau*) was fully (and solely) applicable[347]. This situation was maintained until 1948[348]. From 1948 to 1999, Chinese with Portuguese nationality were to be submitted to the Portuguese law[349]. Chinese who were born in Macau, yet holding a Chinese nationality, were subjected to the Chinese civil law[350].

Prior the Macau handover to China in 1999, the Portuguese ceasing administration has enacted a handful of new codes for Macau (Criminal Code of 1996; Criminal Procedure Code of 1996; Civil Code of 1999, Civil Procedure Code of 1999, Commercial Code of 1999 – the so-called Big 5 Codes («*Cinco Grandes Códigos*»)- and two Arbitration laws, which were not revoked until recently by Law n.º 19/2019 («*Lei da Arbitragem de Macau*»)[351].

This set of laws are applicable to all Macau residents. Mediation was bluntly ignored though. As for mediation, the era of *legal dormancy*[352] and *cultural divergence with law*[353] had just begun. The following sub-chapter about *two-layered cultural origi-*

345 Carla Araújo, "Tribunal Privativo dos Chinas de Macau (1917-1927)", *cit.*: 1469 ff. See also: João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 81 ff.

346 This voracious trend towards the erosion of the *first layer of law and reality* has been pinpointed by renowned doctrine: «as we have shown in previous discussions, it is quite obvious that both the Ming Dynasty and the Qing Dynasty had jurisdiction over Macau for a long time. *Chinese residents in the area followed their own customs and were ruled by the Guangdong government under Imperial law*. The written laws of the Ming and the Qing dynasties are of course a part of the Macau legal history. *Nevertheless, this part of the legal history of Macau has had no basis impact on the current Macau law*, like the same set of rules has left no influence on the current legal system in Mainland China» (italics added); See: Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 642.

347 Carla Araújo, "Tribunal Privativo dos Chinas de Macau (1917-1927)", *cit.*: 1469 ff.

348 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 81 ff.

349 Carla Araújo, "Tribunal Privativo dos Chinas de Macau (1917-1927)", *cit.*: 1469 ff.

350 João Vieira Guedes, "Contributo para uma História do Direito Penal e Processual Penal e das Instituições de Administração de Justiça de Macau", *cit.*: 81 ff.

351 The Law n. º 19/2019 («Lei da Arbitragem de Macau») kicked-off an era of unity and uniformization in arbitration, which has managed unwind (even: wind off) an era of scattered and botched bifurcation between the Decree Law n. º 29/96/M, of 11th of June (Law of Internal Arbitration) and the Decree Law n. º 55/98/M, of 23rd of November (Law of External Arbitration). See: https://bo.io.gov.mo/bo/i/2019/44/lei19.asp (access: 02.07.2023).

352 See: Point 6.2. to point 6.2.2.1. of this paper (on legal dormants).

353 See: Point 6.2. to point 6.3.2.1. of this paper (on cultural divergence with law).

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nalism will bestow upon us a vivid portray of such *legal dormancy* and *cultural divergence with law*[354].

5. THE INCEPTION OF A *TWO-LAYERED CULTURAL ORIGINALISM* IN MACAU

5.1. Macau as a stage for a harmonious coexistence between Portuguese Christianity-based faith and Chinese Confucian-beliefs-based culture (1557-2023): Introduction

A *two-layered law and social reality* has just been skeletally sketched out. The time is ripe to address an underlying issue: a *two-layered cultural originalism* encompassing Portuguese Christianity-based faith and Chinese Confucian-beliefs-based culture, which is in force in Macau since the middle of 16th century (1557) to this day (2023).

Whilst it is certain that a *two-layered and social reality* was vibrant in Macau between the middle of the 16th century to the middle of the 19th century (roughly until 1849), a *two-layered cultural originalism*[355/356/357] comprising a minority of Portuguese that nurtured

354 *Cultural divergence with law* (spawned by both the *two-layered law and social reality* and the *two-layered cultural originalism*, extensively sketched out at the first pillar of the four-tiered model of dispute resolution – *Social Dynamics of Dispute Resolution*), which was excelled by the *language issues* with which Macau has been grappling for centuries now. See: Salvatore Casabona, "The Law of Macau and Its Language: A Glance at the Real Masters of the Law", *Tsinghua China Law Review*, 4 (2012): 223-254 (on the manifold language issues with which Macau has been tussling for a long-winded time).

355 I will use the term *originalism* to express a *cultural originalism* or an *original cultural meaning* (as opposed to *original semantic meaning* of a Constitution or a given law). «The semantic meaning of a word or phrase is its dictionary definition or to definitions that arc in common us among the population; hence «*original semantic meaning*» refers to dictionary definitions or to definitions in common us at the time of adoption»; (italics added) Jack M. Balkin, "Must We Be Faithful to Original Meaning?", *Jerusalem Review Legal Study*, (7) (2013): 57-77; Jack M. Balkin, "The New Originalism and the Uses of History", *Fordham Law Review*, 82 (2013): 641-646. *Original cultural meaning* is not easy to ascertain as grasping its *original cultural meaning* depends on the context (social, philosophical, cultural) in which it has been etched. Hence the *law-in-context* methodology used throughout this paper; See on Originalism: Jack N. Rakovc, "Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism", *San Diego Law Review*, (4), (2011): 575 ff («It is one thing, after all, to suppose that words fraught with political content retain a relatively fixed meaning in 4uiet times, hut it is quite another to apply that assumption to a period like the late 17XOs or the Revolutionary era more generally.»); *id.* at 593 («The adopters of the Constitution inhabited a world that was actively concerned with ... the instability of linguistic meanings, and ... arguments about the definitions of key words and concepts were themselves central elements of political data»). See: Saul Cornell, "Conflict, Consensus & Constitutional Meaning: The Enduring legacy of Charles Beard", *Constitutional Commentary*. 3 (2014): 405 («Given the contentious nature of Founding era legal culture it seems unreasonable to assume that one can identify a single set of assumptions and practices from which to construct an ideal reasonable reader who could serve as model for how to understand the Constitution in 17XX.»)»; textually, Jack M. Balkin, *The Construction of Public Original Meaning. Constitutional Commentary*. Minnesota, University of Minnesota Law School, 26 (2016): 78.

356 One must agree with the insightful views of Jack Balkin on the rejection of the «well trained lawyers criteria» to ascertaining «original public meaning». «We might argue that the original meaning of the text is the meaning that well-trained lawyers, using the interpretive methods generally employed at the time of adoption, would have gleaned from the official text. This approach, called "original methods," has been championed by John McGinnis and Michael Rappaport. The legal understandings of ordinary individuals are not part of the original public meaning except to the extent that they would be incorporated into the views of well-trained lawyers using original legal methods. Therefore the understandings of German and Dutch speakers who read the Constitution in translation, are, for the most part, irrelevant to the original public meaning. Only the views of German and Dutch speakers who were also well-trained lawyers would be relevant, and only to the extent that they, as well-trained lawyers, had opinions about the English text that became law»; Jack M. Balkin, *The Construction of Public Original Meaning*, *cit.*: 78 ff.

357 Acclaimed North American doctrine often criticizes the Supreme Court of the United States of America and the Court of Appeals, respectively, for paying little to none attention at all to the scrutiny of original public meaning of

Christianity-based faith and the overwhelming majority of Chinese that nurtured Confucian-beliefs-based culture did not lag behind. Quite the opposite, they both persist to this day. Especially the Chinese Confucian-beliefs-based culture upheld by most of the Chinese community currently living in Macau.

This means that there was a bifurcation in Macau´s legal history. Between the middle of the 16th century to the middle of the 19th century (roughly until 1849), a *two--layered law and social reality* and *two-layered cultural originalism* walked together throughout the long-winded road of social and legal history of Macau. Further down the road (after 1849), they did split up. They have moved on separate paths. At a certain point, a *two-layered law and social reality* ceased to exist (after 1849). From that point onward, Macau legal history shifted towards the erosion of the *first layer* (Chinese bodies of laws and special jurisdiction to Chinese-non-converted to Christianity) and the full emergence of the *second layer* (Portuguese-inspired bodies of laws applicable to Portuguese, Chinese converted to Christianity, and, at a certain stage, to Chinese--non-converted to Christianity) of law and social reality.

On the other hand, a *two-layered cultural originalism* constituted by Portuguese Christianity-based faith and Chinese Confucian-beliefs-based culture has maintained its main (and original) tenets from the middle of the 16th century to this day. There is a good reason for that: culture is not amenable to a revamp by means of a decree. Unlike laws. One can change drastically a legal framework overnight. Not the underlying culture in which the former sits though. That is the reason why I have been continually touting the *two-layered cultural originalism* between Portuguese Christianity-based faith and Chinese Confucian-beliefs-based culture: no matter how hard a given (and circumstantial) lawmaker endeavours, he is downrightly unable to surpass, outstrip or overhaul a deep-rooted culture in which a given legal framework sits. There is a culture (in this case a Chinese Confucian-beliefs-based culture) which has resisted Portuguese

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the United States of America Constitution. Examples of this to be frowned-upon trend are: Arizona v. United States, 132 S. Ct. 2492 (2012); Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012); Medellín v. Texas, 552 U.S. 491 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Breard v. Greene, 523 U.S. 371 (1998); Regan v. Wald, 468 U.S. 222 (1984); Dames & Moore v. Regan, 453 U.S. 654 (1981); Haig v. Agee, 453 U.S. 280 (1981); DeCanas v. Bica, 424 U.S. 351 (1976); Zschernig v. Miller, 389 U.S. 429 (1968); Zemel v. Rusk, 381 U.S. 1 (1965); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Perez v. Brownwell, 356 U.S. 44 (1958); United States v. Caltex (Phil.), Inc., 344 U.S. 149 (1952); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); MacKenzie v. Hare, 239 U.S. 299 (1915); Juragua Iron Co. v. United States, 212 U.S. 297 (1909); Neely v. Henkel, 180 U.S. 109 (1901); The Paquete Habana, 175 U.S. 677 (1900); Fong Yue Ting v. United States, 149 U.S. 698 (1893); In re Ross, 140 U.S. 453 (1891); Jones v. United States, 137 U.S. 202 (1890); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Ker v. Illinois, 119 U.S. 436 (1886); Fleming v. Page, 50 U.S. (9 How.) 603 (1850). See: Andrew Kent, "The New Originalism and the Foreign Affairs Constitution", *Fordham Law Review*, 82 (2) (2013): 757-758. Antithetically, US Supreme Court´s decision delivered on *Heller* 554 U.S. 570 (2008) constitutes a fine example of the pursuit for Originalism, which has merited the applause of renowned doctrine. See: Jamal Greene, "Selling Originalism", *Georgetown Law Journal* 97 (2009): 657-659 (arguing that Heller constitutes "the most thoroughgoing originalist opinion in the Court's history").

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lawmaker´s staggering efforts in wipe (ing) out the gist of such Chinese-Confucianist *cultural originalism*.

Which prompts the question: how so? Portuguese bodies of laws embody a litigation-driven penchant in which few to none room to amicable means of solving disputes were made. Conversely, Chinese bodies of laws and the Confucian-based normative «Rites» lagged behind. They have been submerged on the cauldron of history (especially from 1849 onwards). The same cannot be said with regard to the underlying penchant for solving disputes through conciliatory means (just like mediation), deeply etched at the backbone of Chinese Confucian-beliefs-based culture though.

They both (mediation and the penchant for solving conflicts through amicable means) stand at the limbic stage of *legal dormants* and *cultural divergence with* law though. They are both (yet temporarily) *sleeping beauties* waiting to be awaken/awoken from their long-held legal sleep.

5.2. The importance of culture (1557-2023) in shaping *cultural originalism* («society free from litigation»): How has the interplay between Confucianism and Mediation in ancient Imperial China shaped the first layer of cultural originalism of China and Macau

There is a starting point that one must not lose sight of: at the *first layer* of *cultural originalism* (Chinese Confucian-beliefs-based culture) from immemorial times «Chinese community of Macau always resorted to the Chinese alderman, and the local customary rules also played a key role in solution of disputes»[358/359/360]. This is a legal tradition deeply embedded in Macau´s backbone, soaked in Confucianist traits.

358 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.,* 631 ff.

359 The same goes for the impact of Confucianism as far as boosting Mediation (and especially Arbitration) in Hong Kong is concerned: David Holloway/Feng Lin/Linda Chelan Li/Xiaohe Zheng/Mantak Kwok, "Strengthening Hong Kong´s Position as an Arbitration Hub in the Belt and Road Initiative", *International Arbitral Law Review*, 21 (4), (2018): 106-107 («Hong Kong has a long history of providing arbitration services. In the early years of Hong Kong as trade port, the traditional Chinese preference for informal justice over litigation was deep-rooted in the local communities. British officers performed some arbitral activities among Chinese and English traders even before the colony´s establishment. Two years into the colonial period, an ordinance was enacted at the newly instituted Legislative Council (LegCo) to mandate the governor to refer civil disputes to arbitration but disallowed by the Colonial Office in 1844. A decade later the Civil Administration of Justice (Amendment) Ordinance 1855 was enacted to grant such power to the court. The beginning of the next century saw the introduction of the Code of Civil Procedure Ordinance 1901, which contained provisions based on the English Arbitration Act 1889. The modern arbitral regime in Hong Kong began with the Arbitration Ordinance 1963 that reflected the English Arbitration Act 1950. Amendments to this ordinance were enacted in 1975 to incorporate the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards. In 1985, the Hong Kong International Arbitration Centre (HKIAC) was established to promote and manage the use of arbitration. In 1987, the Law Reform Commission of Hong Kong (LRC) recommended the adoption of the Model Law on International Commercial Arbitration of the United Commissions on International Trade Law (UNCITRAL). The Government accepted the recommendation in 1989»).

360 See also: for a nuanced historical account on Mediation and Arbitration in Hong Kong, Derek Roebuck/Christopher Munn, "Something So Un-English: Mediation and Arbitration", 1841-1865, *Arbitration International*, 26 (1), (2010): 87 ff; John Choong/J. Romesh Weeramantry, "Arbitration Law in Hong Kong: Past and Present", *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, Hong Kong, Sweet and Maxwell, (2011): 1-7.

Against the backdrop of Confucianism, solving disputes through conciliatory means (like mediation propelled by Confucianism beliefs[361]) has always played a pivotal role in the history of dispute resolution in China and Macau. There is an inextricable link between Confucianism and Mediation. As so well adduced by acclaimed Chinese doctrine: «The success of China's alternative dispute resolution can be attributed to its historical value on *Confucianism and mediation*, the traditional inaccessibility of Chinese courts for most citizens, and the corruption and lack of training for Chinese magistrates (….) *Confucianism is a philosophy that has dominated Chinese history for over two thousand years*. *It promotes the belief that litigation brought social disharmony*. Its emphasis on "moral and customary principles of polite conduct" fostered the development of mediation in China as Chinese citizens avoided litigation in fear of disrupting moral and customary standards. *For example, until 1949, village and family elders were tasked with the responsibility of resolving disputes through mediation in China*».[362/363/364]

Regarding the propensity of Chinese culture (and the underlying Confucianism beliefs) to adhere hastily to conciliatory dispute resolution mechanisms (especially Mediation), scholars like Jerald Auerbach[365/366] have written extensively of the Quaker[367], Chinese and Jewish communities ´reliance on mediation[368] on the heels of their downright distrust of alien legal[369] culture[370/371].

361 See also: Benjamin O. Kostrzewa, "China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?", *Pacific Rim Law & Policy Journal*, 15 (2006): 518-523.

362 Jiali (Keli) Huang, "One Country, Two Systems: Hong Kong´s Unique Status and the Development and Growth of Arbitration in China", *Cardozo Journal of Conflict* Resolution, 18(2) (2017): 432 (italics added).

363 See: Amanda Stallard, "Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution", *Ohio State Journal on Dispute Resolution*, 17 (2002): 468-477.

364 See also: Michael T. Colatrella, Jr., "Court-Performed" Mediation in the People's Republic of China: A Proposed Model to Improve the United States Federal District Courts' Mediation Programs, *Ohio State Journal on Dispute Resolution*, 15 (2000): 391, 398–99.

365 Jerold S. Auerbach, *Justice without Law? Resolving Disputes without Lawyers*, Oxford, Oxford University Press, (1982): 8 ff.

366 Bruce H. Mann, "The Formalization of Informal Law: Arbitration Before the American Revolution", *New York Law Review*, 59 (1984): 443.

367 See: Part II, Chapter III, point 3.5. to 3.5.2.1.1. of this paper.

368 Hugo Luz dos Santos, "Mediation Needs to be Mediation: How Should a Prospective Mandatory Mediation Legal Framework in Macau Look Like", *Wonkang Law Review*, KCI Indexed, Wonkwang Legal Research Institute, 36 (2), June 2020, (2020): 163-211.

369 Jacqueline Nolan-Haley, "Mediation: The "New Arbitration", *cit.*: 88 ff.

370 See: Jason A. Colquitt/Jessica B. Rodell, "Justice, Trust, and Trustworthiness: A Longitudinal Analysis Integrating Three Theoretical Perspectives", *cit.*, 1188 (As previously emphasized, there is an acute interaction between the *correct exercise of justice*, *neutrality*, *fairness*, *trust* and, foremost, *trustworthiness*, which are to be perceived by the *service users* (citizens) as they gain access to the judicial system) (italics added). See: Jacqueline Nolan-Haley, "Mediation: The "New Arbitration", *cit.*: 88.

371 The same linkage (justice as a *public service*; *trustworthiness* and *trust* perceived by the *service users* (citizens who access the Judicial System in a regular basis) have been delineated by illustrious French doctrine; see E Severin, "Comment l´espirit du management est venu à l´administration de la justice", *La Nouveau Management de la Justice et l´indépendance des juges*, Paris, Dalloz, (2011): 54 ff; in Portuguese doctrine,

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Chinese culture proneness (steeped in Confucianism traits) to embrace amicable mechanisms to solve disputes dates back centuries[372/373]. As so presciently contended by Professor Peter Chi Hin Chan, «while civil adjudication existed in imperial China, the legal tradition of wu song ('[a society] free from litigation') played a fundamental role in shaping China's imperial civil justice system. Under the Confucian ideology, disputes of a civil nature should be settled through conciliatory means so that the amicable relations of the disputants could be maintained. The culture of face-saving and the maintenance of cordial relations remains a distinctive characteristic of the modern Chinese society. This legal historical background provided the ideological foundation for civil procedural systems during the Republican era (1911-1949) and the early days of the People's Republic (since 1949). The current debate on the contemporary mediation system is placed into the appropriate context when one understands that *civil process in China today still operates under the shadow of cultural norms of the traditional Chinese legal order*»[374].

Confucianism envisaged the ideal society as one *free from litigation* (*wu song*): «*Disputes should be resolved through mediation to preserve social harmony. Under the Confucian ideology*, disputes of a civil nature should be settled through conciliatory means so that the amicable relations of the disputants could be maintained. *Litigation should be the last resort*»[375].

following roughly the same trend, Miguel Mesquita, "A flexibilização do princípio do dispositivo do pedido à luz do moderno Processo Civil", *Revista de Legislação e de* Jurisprudência, 143, (2016): 134 e ss; José Lebre de Freitas, *Introdução ao processo civil (conceito e princípios gerais à luz do novo Código)*, Coimbra, Coimbra Editora, (2013): 148-164; Hugo Luz dos Santos, "A distribuição dinâmica do ónus da prova no direito probatório material português: algumas notas de *iure condendo*", *Revista de Direito e de Estudos Sociais,* LVII (XXX da 2ª Série), N.º 1-4 (2016): 268 ff; Hugo Luz dos Santos/Wang Wei, "A distribuição dinâmica do ónus da prova no direito processual civil de Portugal e da Região Administrativa Especial de Macau: algumas notas à luz do direito comparado", *Scientia Ivridica*, LXVI (343) (2017): 60-65; Miguel Teixeira de Sousa, "Apontamento sobre o princípio da gestão processual no novo Código de Processo Civil", *Cadernos de Direito* Privado, 43 (2013): 10 ff. In English doctrine, Neil Andrews, *The Modern Civil Process*, Tübingen, Mohr Siebeck, (2008): 48 e ss.

372 Peter Chi Hin Chan, "The Enigma of Civil Justice in Imperial China, A Legal Historical Enquiry", *Maastricht Journal of European and Comparative Law*, 19 (2012): 317-337 («The Chinese imperial magistrate believed that the code was only one source of law. Aside from statutory law (fa), Confucian concepts, such as 'qing li', were commonly used as the yardstick for magisterial adjudication. The word 'qing' has the literal meaning of 'human compassion'. The word 'li' (literally meaning 'reason'), when used in Chinese traditional scriptures, denoted the Confucian reasoning model (which was commonly captured in the concept of tian-li»).

373 Peter Chi Hin Chan, "Civil mediation in imperial, republican and modern-day China Historical and cultural norms under the traditional Chinese legal order", *cit.*: 578 footnote 1 («However, one should not overlook the influence of Legalism, as a governing ideology, over the development of traditional Chinese law. The Legalist doctrine, as MacCormack had cogently summarized, emphasized the equality of imperial subjects before the law, the promulgation of a clear and unambiguous penal code as an effective means for administrative control, and the supremacy of the imperial ruler. MacCormack argued that there were other unique traits of traditional Chinese law that were neither Confucian nor Legalist. These traits were doctrines of traditional Chinese conservatism, symbolism and technical attributes of the traditional Chinese legal process»); See also: G. MacCormack, *The Spirit of Traditional Chinese Law*, Athens, GA: University of Georgia Press, (1996): 8 ff.

374 Peter Chi Hin Chan, "Civil mediation in imperial, republican and modern-day China Historical and cultural norms under the traditional Chinese legal order", *The Legal History* Review, 85 (2017): 577-602 (578 ff) (italics added).

375 Peter Chi Hin Chan, "Civil mediation in imperial, republican and modern-day China Historical and cultural norms under the traditional Chinese legal order", *cit.*: 578. See also, Shiga asserted that civil justice in imperial

Chinese cultural background impacted also the manner through which criminal law and civil law disputes were handled. On one hand, «in imperial China, the ruling elites were mostly concerned with the enforcement of the criminal code given its direct relevance to the maintenance of public order»[376/377].

On the other hand, «civil disputes were handled by the local communities, with occasional guidance from and participation of local authorities. From a proceduralist perspective, this phenomenon can be explained with reference to a procedural spectrum that tracks the degree of formalism and complexity of legal processes. At one end of this spectrum, the state enforces the criminal code through formal procedures and its sophisticated governing apparatus. At the other end of the spectrum, disputes of a civil nature were mostly handled by community leaders in an informal manner (usually through mediation). Magisterial adjudication of civil cases, which played a role only when the community could not resolve the disputes themselves, probably occupied the centre of the spectrum»[378].

However, «*the traditional Chinese understanding of mediation is categorically different from modern-day concepts of mediation. The fundamental principles of party autonomy, the neutrality of the mediator and mediation confidentiality in mediation generally practised in modern-day Europe were alien to the Chinese traditional legal culture*. The common term for mediation in imperial China is *tiaochu* (调处), which translates into a process that combines conciliation with adjudicative discretions. Swayed by the Chinese ideological preference for harmony, the conciliatory processes during the imperial periods, in its various forms, were designed not just to provide an alternative to litigation, but also to showcase the moral virtues of resolving disputes in an amicable manner. It is therefore believed that mediation in imperial China had strong didactic functions. *Mediators had the inherent mandate to educate the people on Confucian morals and the law*. In this regard, *the traditional Chinese mediator was not an impartial and neutral third party*, but rather a conciliator with a quasi-official mandate *to advance the policy objectives of the imperial ruling elite and its value system*».[379]

China, which was soaked in Confucianism traits, was a distinct form of 'Kadi' justice in which magistrates would arbitrarily decide cases relying upon a bevy of Confucian moral principles rather than statutory law: see S. Shiga, "A Study of Chinese Legal Culture Focusing on the Litigation Landscape", *Journal of Comparative Law*, 3 (1988): 18-26 [滋贺秀 三 '中國法文化的考察以訴訟的形態為素材' 1988年第3期《比较法研究》18-26]. See also: Peter Chi Hin Chan, "The Enigma of Civil Justice in Imperial China, A Legal Historical Enquiry", *Maastricht Journal of European and Comparative Law*, 19 (2012): 317-337 (whose research I have been following closely).

376 Peter Chi Hin Chan, "Civil mediation in imperial, republican and modern-day China Historical and cultural norms under the traditional Chinese legal order", *cit.*: 579.

377 Peter Chi Hin Chan, "The Enigma of Civil Justice in Imperial China, A Legal Historical Enquiry", *cit.*: 317-337.

378 Peter Chi Hin Chan, "Civil mediation in imperial, republican and modern-day China Historical and cultural norms under the traditional Chinese legal order", *cit.*: 579.

379 *Id.* at 578 (italics added).

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With this backdrop in mind, Chinese Confucian beliefs (culture) have proven to be kind-of impervious to the flux of laws originated from the Portuguese *second layer of law and social reality* undertaken from the 1849 onwards. The ever-blowing winds of Portuguese legislative reforms, which swept across Macau from the middle of XIX century onwards, were shielded by the magnitude of a Confucian Chinese millenary culture, which has remained unscathed in spite of it. Here is why: «*in view of the strong basis of the traditional Chinese legal culture, it was very difficult for Portuguese legal elements to penetrate into and be absorbed by the Chinese community*»[380]. Hence the expression *cultural originalism*.

This Chinese Confucian-based-philosophy[381] (which is underpinned by the axiom of a litigation-free society) is currently stranded in shallow waters, which go by the taxonomy of *legal dormants* and *cultural divergence with law* (Portuguese-litigation-driven bodies of laws, which run afoul with the Chinese Confucian cultural originalism, which envisions a society free from litigation).

Such a host of *legal dormants* and *cultural divergence with law* prompted mediation´s eclipse in Macau. They are both in a dire need of quashing. For the sake of mediation´s rebirth in Macau[382]. For the sake of wealth procedural maximization[383]. For the sake of a sought-after overhaul from a state of *culture divergence with law*[384] to a state brimming with *culture convergence with law*[385]. Thereby, to a state brimming with *positive legal-real feel*[386].

6. LEGAL TRANSPLANTS

6.1. Legal transplants: A bird´s eye view on Alan Watson's seminal work

Legal transplants are not just a seasonal buzzwords. Legal transplants have entered the legal jargon with stylishness and flair. Especially from the last quarter of the twentieth century onwards. And rightly so. Legal transplants constituted a change in basic

380 Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *cit.*, 637 ff.

381 A sector of legal thought, science, philosophy, and Enlightenment-era epistemology has shown us the utmost importance of philosophy of law in judicial settings; See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Studies in Contemporary German Social Thought)*, The MIT Press; Reprint edition (January 9, 1998) (1998): *passim*.

382 See: Hugo Luz dos Santos, A Prospective Court-Connected Mandatory Mediation Regime in Macau: A Brief Note, in: Peter Chi Hin Chan/C. H. van Rhee (Editors), Civil Case Management in the Twenty-First Century: Court Structures Still Matter, Beijing/Singapore, Springer Nature, (2021): 199-204.

383 See: Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation (Against the Background of a Narrative of Social Sub-systems in Everlasting Cross-Fertilization)*, Singapore/Beijing/Berlin/New York, Springer Nature, (2023): 1-217, which I will follow closely in this regard.

384 See Point 6.3.2. to point 6.3.2.1. of this paper.

385 See Point 6.3.2. to point 6.3.2.2. of this paper.

386 See: Point 6.3.3.1. of this paper (on positive legal-real-feel).

assumptions in the remit of comparative law. Legal transplants´ main goal was to defy the long-held view that «law reflects society»[387] or «law is the spirit of the people»[388].

In Watson´s insightful view, the premise according to which the law of a given country mirrors completely the society in which the former sits is misleading and ultimately incorrect. According to Watson, it is undeniable that there is a certain degree of connection (even proximity) between law and society. Not an inextricable connection though. Let alone a «reflecting mirror»[389].

Alan Watson draws upon the concept of legal borrowing[390] to fuel his quest to quash the long-held view that there is an inextricable connection between law and society[391]. He stated that «borrowing is much easier than thinking»[392]. The renowned author adduced to a (slight) connection between law and economics. Since «it saves time and money»[393/394]. He goes further down on emphasizing that legal borrowing[395] is a cost-saving[396] and brain-saving process[397] (as opposed to a brainstorming initiative to brew and breed state-of-the-art legal solutions) as «helps the new law to become acceptable because it

387 Alan Watson, "The Birth of Legal Transplants", *Georgia Journal of International & Comparative Law*, 41 (2013): 605-608 (throwing light on the backbone to his seminal concept of legal transplants carved out roughly 40 years ago).

388 *Id.* at 607.

389 *Id.*

390 Alan Watson, "From Legal Transplants to Legal Formants", *The American Journal of Comparative Law*, 43 (1995): 469-474 (regarding legal borrowings, this author would later point out that «for long my own focus on comparative law was on legal borrowings, but I was aware that other general factors were at work. I realized, for example, that most of the time rulers and governments in the Western world as a whole were little interested in making private law. Instead, the task devolved upon some group of the legal elite who became in effect subordinate law makers without having been given power to make law (….) This culture determined the parameters of their legal reasoning, the systems of law that they would borrow from, and even the extent to which they would borrow»).

391 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 1st edition (1974), 2nd edition (1st July of 1993), Athens, Georgia, University of Georgia Press (1974): 1-144 («When it was first published in 1974, *Legal Transplants* sparked both praise and outrage. Alan Watson's argument challenges the long-prevailing notion that a close connection exists between the law and the society in which it operates»).

392 Alan Watson, "The Birth of Legal Transplants", *cit.*, 607.

393 *Id.*

394 Jonathan Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process", *The American Journal of Comparative Law*, 51 (2003): 845 (noting that «perhaps the simplest motivation and explanation for borrowing is that it saves time and costly experimentation»).

395 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, *cit.*: 1-144 (Watson´s «main paper is that a society's laws do not usually develop as a logical outgrowth of its own experience. Instead, he contends, the laws of one society are primarily borrowed from other societies; therefore, most law operates in a society very different from the one for which it was originally created»).

396 Alan Watson, "Aspects of Reception of Law", *American Journal of Comparative Law,* 44 (1996): 335 (arguing that the lawmaker would save both time and thinking by automatically borrowing or adopting the approach of the donor country).

397 Alan Watson, "Society´s Choice and Legal Change", *Hofstra Law Review*, 9 (1980-1981): 1473 ff (stating and reinforcing that law is an autonomous phenomenon that can be decoupled from the social, cultural, economic, and political background within which it operates).

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has recognized pedigree. And a once a foreign system is accepted by State A, it becomes acceptable in State B. Acceptance implies respectability. So the law of State A, through the law of State B, becomes the law of State C, and so on, almost *ad infinitum*»[398].

In Watson´s view, legal transplants[399] resonates with a watershed in comparative law. Before the publication of his paper, the legal scholarship thought (and accepted) for a long-winded span of time that there would impossible to have society without law. Just as it would be impossible to have a law that was not a mirror of its society. After the publication of his paper, Watson stated (somewhat modestly) that «while many people now have accepted my work as establishing new parameters for legal change, I am very conscious that my views represent what has happened in legal development throughout the ages. Thus, I was astonished at the refusal of legal scholars to accept this view for so long»[400]. This unaligned position with the long-standing *status quo* would trigger both overwhelming praise and disquiet (even outrage) across the world.

6.1.1. How has Alan Watson appraised his own academic work: Between initial diffidence and subsequent overwhelming joy

The road towards the publication of the ground-breaking paper *Legal Transplants: An Approach to Comparative Law*[401] was not without some problems. To some extent, Watson himself deemed his paper as a stillborn[402] from the press[403/404]. Many years later the publication of his paper, Alan Watson shared with the legal community how hesitant, self-effaced,

398 Alan Watson, "The Birth of Legal Transplants", *cit.*,: 607.

399 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, *cit.*: 1-144 («when it was first published in 1974, *Legal Transplants* sparked both praise and outrage. Alan Watson's argument challenges the long-prevailing notion that a close connection exists between the law and the society in which it operates (.....) Utilizing a wealth of primary sources, Watson illustrates his argument with examples ranging from the ancient Near East, ancient Rome, early modern Europe, Puritan New England, and modern New Zealand. The resulting picture of the law's surprising longevity and acceptance in foreign conditions carries important implications for legal historians and sociologists. *The law cannot be used as a tool to understand society, Watson believes, without a careful consideration of legal transplants*») (italics added).

400 Alan Watson, "The Birth of Legal Transplants", *cit.*, 607.

401 Alan Watson, "From Legal Transplants to Legal Formants", *cit.*: 469-474 (469-470) (another major contribution brought forward by Watson's work was the connection (or the lack thereof) between lawmakers and the underlying social reality. He pointed out the distance between the lawmakers and the social reality to which they intended to legislate. According to Watson, it all started with the exclusion of professors-judges and professors from law-making, which dates back Roman law. As he puts it «the task devolved upon some group of the legal elite who became in effect subordinate law makers without having been given power to make law. Thus, Roman jurists as such were private individuals with no ties to government: they made law when their opinions came to win approval from other jurists. English judges in the Middle Ages and later were appointed to decide cases: the tradition long was that they found the law but did not make it. Continental law professors were appointed to teach law, not make it. But they did make law when their writings were accepted as having authority by courts or their fellows, perhaps centuries after they wrote. A good jurist was a jurist who was thought to be good by other jurists and persons of similar stranding: likewise with judges and professors. The result of this theoretical exclusion from law-making powers was that these lawmakers developed their own legal culture which was to that extent distant from social reality. This culture determined the parameters of their legal reasoning, the systems of law that they would borrow from, and even the extent distant from social reality»).

402 Gary Francione, "Alan Watson's Controversial Contribution to Scholarship", *Georgia Journal of International and Comparative Law*, 31 (2002): 59-61 (using the expression «stillborn»).

403 Alan Watson, "Law and Society", *Beyond Dogmatics: Law and Society in the Roman World*, John W. Cairns/Paul J. Plessis (Eds.), (2007): 9.

404 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, *cit.*: 1-144 (118).

and diffident he felt back then. He has narrated such state of hesitation in the first person «After I wrote *Legal Transplants*, I followed my usual practice of sending the manuscript to many friends for review. Some of my closest friends, to whom I attribute the utmost good faith, expressed horror and advised me to hide it. Only my old friend and mentor, David Daube, though it was brilliant and he told me that I should publish it immediately. Unfortunately, I lacked the self-confidence in the wake of such overwhelming negativity to go forward, so I hid it for five years. I only decided later to publish it after David expressed fury that I, for once, had failed to follow his advice. He convinced me to send it to the publishers and I got immediate offers to publish»[405].

Much to Watson´s delight and amazement, *Legal Transplants´: An Approach to Comparative Law* success and impact in the academic *fora* exceeded his wildest and rosy expectations. He would express his amazement in the following manner «for years after its publication, though, the paper appeared not to make a ripple in the legal world. Then, much to my amazement, it suddenly exploded in different parts of the world at the same time»[406]. He continued by saying that[407] «one of the most gratifying things about *Legal Transplants*, in addition to its widespread acceptance, has been the many friends that I have made across the world because of it[408]. From Sweden to South Africa to Serbia, *Legal Transplants* has enriched my life through a widespread group of friends and colleagues who believe in this aspect of my work[409]. Some scholars do no live long enough to see their initially controversial work become truly accepted, if indeed it ever is. I am one of the fortunate ones and I am grateful for the privilege»[410]. The steady stream of critics was about to begin though. Such steady stream of critics was to be espoused by a groundswell of praise nonetheless.

6.1.2. Legal transplants in a midst of an outpouring of praise and outrage: A snapshot on the literature review further the publication of Alan Watson´s ground-breaking academic work

Legal Transplants: An Approach to Comparative Law sparked a handful of (mixed) reactions from academicians worldwide. On one hand, Watson´s work has merited enthusiastic appraisals such as «seminal text in comparative law»[411]. More than a

405 Alan Watson, "The Birth of Legal Transplants", *cit.*, 607.

406 *Id.*

407 *Id.*at 608.

408 *Id.*

409 *Id.*

410 *Id.*

411 Thomas E. Carbonneau, "Paper Review, Patrick Glenn, Legal Traditions of the World, Sustainable Diversity in Law", *The American Journal of Comparative Law*, 48 (2000): 729. Comparative law amounts to a thrust to grasp a host of similarities and differences between legal systems against the backdrop of different legal traditions. See: Mathias Reimann/Reinhard Zimmermann (Editors), *The Oxford Handpaper of Comparative Law*, 2nd edition,

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decade later of Charbonneau's positive appraisal, *Legal Transplants* got included

Oxford Handpapers, Oxford, Oxford University Press, (2018): 1-1456; Jan M. Smits (Editor), *Edgar Encyclopedia of Comparative Law*, 2nd edition, Edward Elgar Publishing, Cheltenham, U.K.; Northampton, MA (2012): 1-1024. But comparative law (and within which core the doctrinal subset of legal transplants) must not lose sight of the fact that any thrust to transfer rules, legal institutes, or parts of a legal system to another (hence legal transplants) must be premised on a sound law-in-context methodology while paying close attention to the underlying social reality of the receiver legal system to which I have been drawing attention to since the inception of this paper. Something that the groundswell of legal transplants of U.S. court-connected dispute resolution programs to Africa, Europe and Latin America has been oblivious of. See on the dire need for contextualization: Reza Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity*, Berlin/New York, Springer, (2014): 1-304 (145-146). Converging: Sebastian McEvoy, *Descriptive and Purposive Categories of Comparative Law*, Pier Giuseppe Monateri (Editor), Cheltenham, U.K.; Northampton, MA: Edward Elgar Publishing, (2012): 1-325. Unsurprisingly, attention has been drawn to the noxious effects of globalisation of legal transplants with western values undertones. See: Prakash Shah, "Globalisation and the Challenge of Asian Legal Transplants in Europe, ", *Singapore Journal of Legal Studies*, 2005 (2) (2005): 349 (alluding to the «recent pressures of globalisation according to Western terms» all over the world). See also: Maria Angela Jardim de Santa Cruz Oliveira/Nuno Garoupa, "Choosing Judges in Brazil: Reassessing Legal Transplants from the United States", *The American Journal of Comparative Law*, 53 (2011): 529-561 (on the issue of legal transplants from the United States to Brazil and the extent to which legal transplants from the United States of America chimed in with Brazil´s legal culture). The globalisation of American legal imperialism towards China has spawned the well-known movement of Critical Legal Orientalism. See: Thomas Coendet, "Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese law", *The American Journal of Comparative Law*, 67 (2019): 775 (contending that «Critical legal Orientalism is a tale of two empires, The Unites States and China. In the mid-nineteenth century, the United States established a special U.S. court fot China, thus incorporating China as the largest district of their jurisdiction. This extraterritorial court operated for about a century and advanced American legal imperialism in China that continues today. It is an empire founded on the notion of China as a place where law actually does not exist because neither its subjects nor its state lives up to the rule of law. Such Western assumptions about China and its legal tradition are called "legal Orientalism"»). The *longa manus* of American legal imperialism has also reached Switzerland. There have been calls decrying such an «Americanization» of the Swiss Legal Culture. See: Jens Drolshammer (Editor), *The Americanization of Swiss Legal Culture: Highlights of Cultural Encounters in an Evolving Transatlantic History of Law*, Bern, Switzerland, Stämpfli Publishers (2016). See also: Johannes Reich, "Paper Reviews", *The American Journal of Comparative Law*, 66 (2018): 718-726. With this backdrop in mind, it should not come as a surprise that such «migration» of legal concepts between glaringly different legal systems and legal traditions has spawned the so-called «legal irritants». The thrust to throwing light on whether and to what extent some legal transplants to «take root» and «others fail» would not lag far behind. See, respectively, Sujit Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law", *The Migration of Constitutional Ideas*, Sujit Choudhry (Editor), Cambridge, United Kingdom, Cambridge University Press, (2006): 1-460 (12-17) (on the «migration» of ideas and the challenges arisen from such event); Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford, Oxford University Press, (2014 reprint in 2016): 1-318 (2-6) (on the host of challenges arisen from legal transplants between different legal systems); Gunther Teubner, "Legal Irritants, *The Modern Law Review*, 61 (1998): 10-14 (pouring in trenchant criticism on the stance according to which rules, legal institutions are amenable to be «transplanted» from one legal system to another). See: Eirini Eleftthenia Galinou, "Legal Borrowing: Why Some Legal Transplants Take Root and Others Fail", *Comparative Labor Law & Policy Journal*, 25 (2004): 391-422 (shedding light on the set of underlying reasons that dictate that some legal transplants «take root and others fail»). This drawn-out footnote is to set the stage to my newly-crafted concept of *legal pollination* (whose foundations have been laid at the third pillar of my four-tiered model of dispute resolution – *legal dynamics of dispute resolution* – against the backdrop of, and drawing on the findings arisen from, an in-depth historical account undertaken at the first pillar my four-tiered model of dispute resolution – *social dynamics of dispute resolution*). Which begs the research question: why has the newly-crafted concept of *legal pollination* heavily relied upon a nuanced historical account? Because grasping the importance of the concept of legal pollination would be utterly untenable devoid of, and decoupled from,

on a paper on methods of comparative law, specifically in a part devoted to «Legal Transplants and Transnational Codes: Questioning on Cultural Biases and Scientific Statements»[412].

On this very paper about comparative law, there was another author who has lavished nothing but undeterred praise to *Legal Transplants.* The author Chen Lei hailed Watson´s academic work as a «magisterial paper»[413]. In this vein, it was common to see *Legal Transplants* been deemed as a reference[414] in the field of comparative law[415] or as a «landmark paper, a major contribution to the field of comparative law»[416.] However, some scholars boded that the «study of legal transplants seems to have reached its saturation point»[417]. This prediction[418] seems to have been countervailed by another positive appraisal, which has confirmed the validity of the research undertaken by Alan Watson regarding the jury trial in Japan[419].

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the invaluable contribute of legal history and a law-in-context methodology of which this paper has taken heed of. This methodological approach is consistent with the best doctrine, which has contended that the analysis of different legal systems must not forsake a cultural, social, and economic context of the receiver legal system. See: Mathias Siems, "The Power of Comparative Law: What Types of Units Can Comparative Law Compare?", *The American Journal of Comparative Law*, 67 (2019): 865-873 (drawing attention to the fact that the analysis of given legal system must not relinquish an interdisciplinary methodology, ranging from Legal History, Sociology studies, Cultural Studies, Legal Studies). My four-tiered model of dispute resolution has incorporated such a set of invaluable teachings as an *interdisciplinary methodology* stands at its heart.

412 Geoffrey Samuel, "All that Heaven Allows: Are Transnational Codes a "Scientific Truth" or Are They Just a Form of Elegant "Pastiche", *Methods of Comparative Law, Research Handpapers in Comparative Law Series,* Pier Giuseppe Monateri, Cheltenham, United Kingdom, Edgar Elgar Publishing (2012): 165-170 («Methods of Comparative Law brings to bear new thinking on topics including: the mutual relationship between space and law; the plot that structures legal narratives, identities and judicial interpretations; a strategic approach to legal decision making; and the inner potentialities of the 'comparative law and economics' approach to the field. Together, the contributors reassess the scientific understanding of comparative methodologies in the field of law in order to provide both critical insights into the traditional literature and an original overview of the most recent and purposive trends»).

413 Chen Lei, "Contextualizing Legal Transplant: China and Hong Kong", *Methods of Comparative Law, Research Handpapers in Comparative Law Series*, Pier Giuseppe Monateri (Editor), Cheltenham, United Kingdom, Edgar Elgar Publishing (2012): 192.

414 Simone Glanert, "Method?", *Methods of Comparative Law, Research Handpapers in Comparative Law Series,* Pier Giuseppe Monateri (Ed.), Cheltenham, United Kingdom, Edgar Elgar Publishing (2012): 61-63.

415 Pier Giuseppe Monasteri, "Methods in Comparative Law: An Intellectual Overview", *Methods of Comparative Law, Research Handpapers in Comparative Law Series,* Pier Giuseppe Monateri (Editor), Cheltenham, United Kingdom, Edgar Elgar Publishing (2012): 19-22.

416 Frances H. Foster, "American Trust Law in a Chinese Mirror", *Minnesota Law Review*, 94 (2010): 602-610.

417 Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom", *The American Journal of Comparative Law*, 58 (2010): 583 ff.

418 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *Georgia Journal of International & Comparative Law*, 41 (2013): 637-696 (parsing Watson's essay with nuanced references). Whose research I will follow closely.

419 Meryll Dean, "Legal Transplants and Jury Trial in Japan", *Legal Studies*, 31 (2011): 570 ff (canvassing the origins of Watson's seminal paper and its underlying theory by examining and confronting it with the system of jury trial in Japan).

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In the same vein, *Legal Transplants: An Approach to Comparative Law* has been touted as a «seminal paper»[420] in comparative law. The reason is clear and straightforward[421]: «since the early work of Alan Watson, legal transplants have become central to the study of comparative law»[422]. *Legal Transplants: An Approach to Comparative Law* is a worldwide success as «the simplest search through standard data bases shows many more examples of continuing reliance on Alan´s work. There is life in the idea yet»[423].

The outpouring of praise to *Legal Transplants: An Approach to Comparative Law* seemed to have no bounds[424]. A French judge named Marcel Ancel[425] made a review on Alan Watson's work in which he adhered to the bulk of his academic conclusions[426]. The same can be said as for the review made by Charles Maechling in which he reached roughly the same conclusions of Marcel Ancel. Charles Maechling argued that *Legal Transplants: An Approach to Comparative Law* was not an endeavour to bring forward an «expansive new approach»[427], but instead[428] a thrust to throw light on a «sharper focus and more rigorous analytical approach»[429] «to a field hitherto eclectic and narrowly empirical»[430].

However, Charles Maechling decried both the brevity of the paper and the lack of a larger set of historical examples to premise its findings[431]. To some extent, Maechling has also criticized the scantiness of a law-in-context methodology[432] to support Watson´s conclusions[433/434]. In his insightful opinion, the essay lacked also a somewhat

420 Maraina Pargendler, "Politics in the Origin: The Making of Corporate Law in Nineteenth-Century Brazil", *American Journal of Comparative Law*, 60 (2012): 805-806.

421 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

422 Gilles Cuniberti, "Enhancing Judicial Reputation Through Legal Transplants: Estoppel Travels to France", *Am. J. Comp. L.*, 60 (2012): 383 ff.

423 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696 (passim).

424 *Id.*

425 Marc Ancel, "Paper review Legal Transplants: An Approach to Comparative Law", *Revue Internationale de Droit Comparé,* (1975): 303-304.

426 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

427 Charles Maechling, "Paper Review Legal Transplants: An Approach to Comparative Law", *Virginia Journal of International Law*, 15 (1974-1975): 1037-1039.

428 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

429 Charles Maechling, "Paper Review Legal Transplants: An Approach to Comparative Law", *cit.*: 1037-1039.

430 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

431 Charles Maechling, "Paper Review Legal Transplants: An Approach to Comparative Law", *cit.*: 1037-1039.

432 Gunther Frankerberg, "Critical Comparasions: Re-Thinking Compararative Law", *Harvard International Law Journal*, 26 (1985): 411-414 (emphasizing the paramount importance of methodology in comparative law, bringing forward a top-notch methodology which rests upon: i) distancing; ii) differing).

433 Edward J. Eberle, "The Method and Role of Comparative Law", *Washington University Global Studies Law Review*, 8 (3) (2009): 452 (noting that «we need to excavate the underlying structure to understand better what the law really is and how it really functions within a society»).

434 See also, Rodolfo Sacco, "Legal formants: A dynamic approach to comparative law: discovering and decoding invisible powers", *The American Journal of Comparative Law*, (1991): 343-385 (echoing the same views in this regard).

nuanced elaboration on the social, political, and economic context that must invariably underpin academic conclusions and findings[435]. This is the *bright side*.

On the *dark side*, *Legal Transplants: An Approach to Comparative Law* also triggered a groundswell of trenchant criticism. Professor Robert B. Seidman and a short note written by an anonym reviewer penned the most hostile reviews. Their criticism can be summarized as follows: Professor Robert B. Seidman asserted (with a dollop of harshness) that Watson´s paper conclusions ranged from «trivial to banal»[436].

Seidman´s academic patience wore even thinner with the absence of consideration of «social variables»[437] and (though implicitly) the lack of use of a law-in-context methodology[438] to premise the conclusions reached. He has rightly stated that social factors[439] should have been carefully weighed up and taken into consideration to premise Watson´s general conclusions.

Conversely, in Seidman´s view, Watson´s has jumped to conclusions without «any careful analysis or testing of hypotheses»[440]. Watson´s work has also been lambasted for not paying close attention to the traditional canons of legal methodology[441]. Seidman´s exact words were that *Legal Transplants: An Approach to Comparative Law* have failed bluntly as to confirm the «acceptance of the categories and methodology of traditional legal scholarship».[442]

There was another *Legal Transplants: An Approach to Comparative Law* paper review which deserves to be remarked upon. Especially for its harshness[443]. This anonym paper review published in *Stanford Law Review*[444] was not by all means docile. It can be said that it was indeed very acrimonious and hostile indeed. The first source of disagreement was Watson´s very definition of legal transplants. According to this anonymous note, Watson´s dared to defy the well-established notion according to which law was a powerful indicator of a people's identity[445]. «It noted that Alan used the idea of legal transplant to compare a number of legal systems»[446].

435 Charles Maechling, "Paper Review Legal Transplants: An Approach to Comparative Law", *cit.*: 1037-1039.

436 R. B. Seidman, "Paper Review Legal Transplants: An Approach to Comparative Law", *Boston University Law Review*, 55 (1975): 682-683.

437 R. B. Seidman, "Paper Review Legal Transplants: An Approach to Comparative Law", *cit.*: 682-683.

438 Vernon Palmer, "From Lerotholi to Lando: Some examples of Comparative Law Methodology", *The American Journal of Comparative Law*, 53 (1) (2005): 265 (stating that «context lies beyond the positive law»).

439 Vivian Grosswald Curran, "Cultural Immersion, Difference and categories in U.S. Comparative law", *The American Journal of Comparative Law*, (1991): 343-385 (arguing the necessity to undertake the «immersion in the culture under review»).

440 R. B. Seidman, "Paper Review Legal Transplants: An Approach to Comparative Law", *cit.*: 682-683.

441 *Id.* at 685-687.

442 *Id.*

443 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

444 Paper Note, "Paper Review Legal Transplants: An Approach to Comparative Law", *Stanford Law Review*, 27 (1975): 1203-1208.

445 Paper Note, "Paper Review Legal Transplants: An Approach to Comparative Law", *cit.*: 1203-1208.

446 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

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The conclusion could not be more incisive. It stated emphatically that «at its best, the paper provides some not very startling insights into legal history that are consonant with the author´s view that comparative law is the study of (mainly historical) relationships between legal systems. At its worst – and too frequently – the paper falls prey to its own criticisms of comparative law: *superficiality and lack of systematization*»[447]. The pace and rate at which harsh criticism were to be done to *Legal Transplants: An Approach to Comparative Law* would be constant over the course of years.

6.1.2.1. Entering the grey area: The both panegyrical and sceptical review penned by Sir Otto Kahn-Freund

Despite the chorus/phalanx of critics, *Legal Transplants: An Approach to Comparative Law* has been heaped praise (mixed with a healthy dose of criticism and – here and there – even some scepticism) by a renowned labour law scholar named Otto Kahn-Freund[448]. This is the grey area. The area in which panegyrics and scepticism meld and dovetail seamlessly.

Professor Otto Kahn-Freund´s appraisal was two-pronged. On one hand[449], his paper review was redolent of, and filled with, praise. Sentences like those I am about to quote portray such level of positive appreciation received: «this brilliant little paper»; «it provokes thought»; «an extremely interesting paper»; an essay «replete with pungent and original observations»[450]. On the other hand, Professor Otto Kahn-Freund «would profoundly disagree with Alan´s conclusions about the ease of transplanting rules»[451].

To the extent that light is to be thrown into Professor Otto´s Kahn-Freund disagreement with Professor Alan Watson's ideas on legal transplants, let us take a step back. Particularly recalling that, according to the latter, the whole thrust of *Legal Transplants* was to assert vigorously that legal borrowing[452] was the most recurrent way of legal development worldwide[453]. Similarly, in Professor Alan Watson's view, it was wholly unnecessary for the borrowing system to have any real (or accomplished) understanding[454] of the legal system[455] from which the host of rules or legal institutions[456] were legally borrowed[457].

447 Paper Note, "Paper Review Legal Transplants: An Approach to Comparative Law", *cit.*: 1203-1208. See: John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

448 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law", *The Modern Law Review*, 37 (1974): 1 ff.

449 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

450 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law", *cit.*: 1 ff.

451 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

452 Alan Watson, "The Birth of Legal Transplants", *cit.*,: 608 ff.

453 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, *cit.*: 1-144.

454 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

455 Mauro Bussani, "A Pluralist Approach to Mixed Jurisdictions", *The American Journal of Comparative Law*, 6 (2011) (noting that caution must be exercised when it comes to drawing the limits of the thrust to understanding the legal system as «the cultural sway of mainstream legal positivism may drive the scholar, even the comparativist, off the track, in search of what is most glimmering, most practically useful, or more comprehensible to the targeted audience»).

456 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, *cit.*: 1-144 (passim).

457 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696.

Furthermore, Professor Alan Watson argued that the longevity of rules was remarkable[458]. In the same vein, comparative law field of study was all about parsing the relationships between legal systems forged[459] by such legal borrowing[460]. From this point onwards, Watson concluded that there is (a tight or loose?) linkage between the nature of the law and the complexity of relationship between law[461] and the society[462] in which the former sits[463] and operates[464]. Professor Otto Kahn-Freund decried this view though.

According to Professor Otto Kahn-Freund, Alan Watson's stance on the relationship between law and society must not be taken at face value[465]. To the extent that the relationship between both is far more intricate, thorny, and complex, caution must be exercised in this regard. Notably, Professor Otto Kahn-Freund, relying upon Montesquieu´s insightful views on this topic, stated that would be a «*un grand hazard*» to conceive the possibility that one country could simply use (and borrow)[466]/[467] the law of another country[468].

To tackle this blemish or shortcoming on Alan Watson's theory, Professor Otto Kahn-Freund[469] argued that a nuanced analysis on when (and how) legal borrowings[470]

458 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, *cit.*: 1-144 (passim).

459 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696 (passim).

460 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, *cit.*: 1-144 (passim).

461 Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)", *The American Journal of Comparative Law*, 39 (1991): 344 (legal formants trigger a spark of contradiction though. «Surprisingly enough, however, the contradiction is only apparent. One can believe both in the omnipresence of the legislator and in the creative power of the judge»).

462 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696 (passim).

463 Rodolfo Sacco, "The Romanist Substratum in the Civil Law of the Socialist Countries", *Review of Socialist Law*, 14 (1) (1988): (on the importance of delving into the origins of a given legal system).

464 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, *cit.*: 1-144 (passim).

465 On the notion of value: F.Q. Tan/Dongjuan Lyu, "Exploring green practices that influence customers 'green engagement value in restaurants", *Social Behavior and Personality: An International Journal*, 53 (6), e13261, 2025;

466 Alan Watson, "Two-Tier Law – A New Approach to Law-Making", *International Comparative Law Quarterly*, 27 (1978): 552-575 (552) (Professor Watson would later show a certain degree of consideration to the social context and community needs in his later work in setting forth a «test of law-making» as follows: «The discussion will proceed at this stage as if this method of law-making is (virtually) the sole available in the particular state of society»).

467 Mauro Bussani/Ugo Mattei, "Diapositives versus Movies – The Inner Dynamics of the Law", *The Cambridge Companion to Comparative Law*, Mauro Bussani/Ugo Mattei (Editors), Cambridge, United Kingdom, Cambridge University Press, (2012): 3 (arguing that to duly understand comparative law one must not lose sight of the fact that legal transplants accounts for «the borrowing of ideas between legal cultures and/or systems»).

468 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law", *cit.*: 6-7.

469 *Id.*

470 Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)", *The American Journal of Comparative Law*, 39 (1991): 4 (noting that «like other sciences, comparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use.

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could be done was duly needed. Accordingly, legal borrowings (and legal transplants) were in dire need of being prescribed prerequisites in order to be fully functional[471]. «He argued that the types of environmental factors that Montesquieu saw as discouraging transplanting were now much less significant, but that constitutional and political factors had become much more important»[472]. Professor Otto Kahn-Freund has further asserted that the thrust to borrow laws should have been coupled with a reflection on the nature of the society[473] that generated the set of borrowing norms and rules[474].

Professor Otto Kahn-Freund would wrap up his review in the following manner[475]: «we cannot take for granted that rules or institutions are transplantable. Any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope, deter legislators in this or any other country from using the comparative method. *All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political context*. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law».[476]

I could not agree more with Professor Otto Kahn-Freund. There is no such thing as a (correct) thrust to transplant a set of rules devoid of, and detached from, a nuanced *law-and-context methodology* of the receiver-legal system. Lest a given lawmaker or policymaker wants to eschew the spectre of rejection of «legal transplants», a nuanced attention to the underlying social reality of the receiver-legal system is not to be

It remains a science when the jurist does make use of it to *borrow* the rules or institutions of foreign legal systems») (italics added).

471 Rodolfo Sacco, "Mute Law", *The American Journal of Comparative Law*, 43 (1995): 464 (arguing that every system has to deal with the phenomenon of mute law. Every legal system is a combination of «both spoken and mute elements». (…) Our legal system is familiar with spoken sources (the written rules, of splendid form and content, produced by legislative assemblies) as well as with unspoken sources (commercial uses, determination of standards of conduct, construction, by an interpreter, of concepts such as fault, reasonableness, bad faith»). In a nutshell, «silence forces of law».

472 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696 (*passim*). Whose research I have followed closely.

473 Alan Watson, "Two-Tier Law – A New Approach to Law-Making", *cit.*: 552-575 (552) (later, Professor Alan Watson gave a shiver of attention to the interplay between law and the underlying social reality. Yet, neither a nuanced nor a slight account about the tandem between law and social reality were to be seen. In this regard, Professor Alan Watson has stated that «the extent to which a source of law is "satisfactory" should be judged, I submit, by three tests. First, how responsive is the law to the serious needs and desires of the community? The more easily a source of law allows law to change when society undergoes change, the better the source of law. Secondly, how comprehensible is the law to the persons affected by it? The more comprehensible the law, the more satisfying the source of law. Thirdly, how comprehensive is the law? The more certainly the existing law can provide an answer to the legal problems that arise the more satisfactory is the source of law. Typically, a tension exists between the ease of comprehension of law and its comprehensiveness»).

474 John W. Cairns, "Watson, Walton, and the History of Legal Transplants", *cit.*, 637-696 (passim).

475 *Id.*

476 Otto Kahn-Freund, "On Uses and Misuses of Comparative Law", *cit.*: 6-28 (27) (italics added).

brushed aside. Macau stands as a paradigmatic example of the inappropriateness of legal transplants to grasp the set of reasons according to which mediation is a *legal dormant* in such a tiny (yet dashing) territory. Here lies the importance of my newly--crafted concept of *legal pollination*.

6.2. Legal Pollination in Macau

6.2.1. The inception of the metaphor of legal transplants: «Can the Western pollen fertilize in the soil of Far-East»? Introduction

Legal transplants - pretty much like everything in life - rests upon a background. The expression «transplant» was very trendy back at the 1960s and 1970s. This word has sprouted in the realm of medicine. Back then, organ transplantation and organ rejection were buzzwords. The eponym of this widespread movement was the South-African medical surgeon, Dr. Christiaan Barnard[477], who was a vocal supporter (and pioneer) of organ transplantation. He gave several lectures worldwide, in which he spoke about both his ground-breaking work in organ transplantation and organ rejection domain. He has also devoted a great deal of time to public-speaking regarding this topic[478].

This medical parlance (organ transplantation and organ rejection) entered the legal jargon with no further ado. It was not before long that renowned jurists such as Jean Rivero[479], John H. Beckstrorm[480] began to use it in the legal domain[481]. Over the course

477 David K. C. Cooper, "Christiaan Barnard—The surgeon who dared: The story of the first human-to-human heart transplant", *Global Cardiology Science Practice*, 2018 (2); (2018): 11 ff («In 2017, we celebrated the 50th anniversary of the first human heart transplant that had been carried out by the South African surgeon, Christiaan ('Chris') Barnard at Groote Schuur Hospital in Cape Town on December 3rd, 1967. The daring operation and the charismatic surgeon received immense public attention around the world. The patient's progress was covered by the world's media on an almost hourly basis. Although the patient, Mr. Louis Washansky, died after only 18 days, Barnard soon carried out a second transplant, and this patient led an active life for almost 19 months. Remarkably, Barnard's fifth and sixth patients lived for almost 13 and 24 years, respectively. Barnard subsequently introduced the operation of heterotopic heart transplantation in which the donor heart acted as an auxiliary pump, with some advantages in that early era. It took great courage to carry out the first heart transplant, and this is why Barnard is remembered as a pioneer in cardiac surgery»).

478 See *Progress on Transplants*, N.Y. Times, Dec. 27, (1969): 2 ff, available at: http://select.nytimes.com/gst/abstract.html. (access: 13.06.2023).

479 In French doctrine, Jean Rivero, *Les phénomennènes d´imitation étrangers em droit administrative*, *2 Pages de Doctrine*, (1980): 459 (this lauded French jurist has used explicitly the word «transplant of organs» in administrative law domain).

480 John H. Beckstrorm, "Transplantation of Legal Systems", *The American Journal of Comparative Law*, 21 (1973): 556-582 (perusing the word «transplantation» in the context of African law).

481 See John W. Wairns, "Development of Comparative law in Great Britain", 1st edition, *The Oxford Handpaper of Comparative Law*, Mathias Reimann/Reinhard Zimmerman, Oxford, Oxford University Press, (2006): 131, 169-171 (noting that the term transplantation was widely used before Alan Watson's seminal work).

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of decades, the term «transplantation» in legal settings would become recurrent[482] in the legal arena[483].

Against this backdrop, no surprise stems from the fact that the metaphor of legal transplants has reached the Far-East. In this vein, most of the Chinese scholars wondered whether and to what extent Macau had a proper legal culture on its own as opposed to having a borrowed legal culture[484] from the Portuguese colonial times[485/486]. The kind of legal transplants (or what kind of legal system Macau is) has been at the back of Macau´s scholars for quite a while now[487.] The type of legal culture that thrived (or not) after the legal transplants has not lagged[488].

Anchored in the in-depth legal history research undertaken on point 4 to point 5.2. of this paper (solely devoted to Macau´s legal history spanning four centuries), this title intends to set forth the concept of *legal pollination* (as opposed to legal transplants) with a view to pave the way to my newly-crafted sub-concepts of *legal dormants*, *cultural convergence with law* and *cultural divergence with law*.

482 Thomas Schlich, "The Origins of Organ Transplantation", *The Lancet*, (2011): 1372-1374 (using the word «transplantation» in legal settings).

483 John W. Wairns, "Development of Comparative Law in Great Britain", 2nd edition, *The Oxford Handpaper of Comparative Law*, Mathias Reimann/Reinhard Zimmerman, Oxford, Oxford University Press, (2019): *passim* (echoing the same views).

484 Mi Jian, "The Future of the Macau Legal System from Conflicts and Exchanges in the Chinese and Western Legal Cultures", *Legal Scholars*, Vol. 5, (1994): 63 ff (noting that Macau has not developed an independent legal culture on its own).

485 Wang Kang Wong, "Chinese Laws´Applicability in Macau: Difficulties and Outlook", *Report on Macau Economic and Social Development*, Wu Zhiliang/Yufan Hao (Editors), Macau, Macau Blue Paper, (2013-2014): 77 («The existing laws in Macau are not truly Macau´s own laws, but those from the outside»).

486 Xu Chang, "On the Existence of the Legal System of the Macao SAR and the Role of Core Legal Basis", "*One Country, Two Systems" Policy and the Perfection of the Legal System in Macau*, Leong Wan Chong, Symposium Essays, China, (2013): 89 (noting that «I am afraid that the so-called existence of the legal system of Macau, in a sense, will mostly be specified on paper and verbally publicized without any existence of a dynamic entity with sustainable development. It is no wonder that it must be packaged in a certain form of coat through the use of the Portuguese language»).

487 Leong Wang Chong, "On the Scientific Orientation and Timely Improvement of the Legal System of the Macao SAR", *Policy and the Perfection of the Legal System in Macau*, Leong Wan Chong, Symposium Essays, China, (2013): 24 (arguing that «Commanded by the Macau Basic Law, the legal system of the Macau SAR is a brand new legal system of the «One Country, Two Systems» policy, its structure, operation, characteristics, and impact have not only tremendously transcended the original format before the return, but also have created the new reality allowing the complementary advantages of both Chinese and Western legal systems. Another point that must be stressed is that the law of the Macau, SAR at the macro-level also constitutes a special type of connotation of the socialist legal system with Chinese characteristics. *Its existence absolutely has not diluted Chinese characteristics*, *but has actually strengthened the originality of Chinese characteristics*. It can never deny the socialist system. Instead, it has provided a realistic illustration for its innovation in the new reality») (italics added).

488 Robert J. C. Young, *Post-Colonialism: An Historical Introduction*, Sufeng Zhou/Jubo Chen (Translation) (2008): 60-63 (noting that, to a certain extent, colonized countries have not legally developed their legal culture after the colonization period).

6.2.2. The concept of legal pollination and its impact on mediation: Why do legal transplants are not applicable to Macau

Legal transplants theory (a legal buzzword for the last 40 years or so) is not applicable to Macau. This conclusion should not be neither baffling nor startling by now. As it was originally conceived by Professor Alan Watson, legal transplants related to moving (borrowing)[489] a rule (or set of rules), legal institutes[490], or a system of law from one country to another[491/492]. As we have seen in Point 4. to point 5.2., that was not what happened in Macau. In Macau, there was a *two-layered law and social reality*[493] (which has lasted roughly until the middle of the nineteenth century) and *two-layered cultural originalism*[494], which still stands to this day. There was no such thing as a tidal wave of senseless and mechanical legal transplantation of laws[495] that managed to brush

489 Alan Watson, *Law, Society, Reality*, Lake Mary, FL, Vanderplas, (2007): 5 (stating that «borrowing, even mindless, is the name of the legal game»).

490 Alan Watson, "The importance of "nutshells", *The American Journal of Comparative Law*, 42 (1994): 1-2 (noting that legal borrowing is not to be circumscribed to legal rules, since the very operation of legal transplant of Roman legal system ranged from rules, legal institutes to legal structures).

491 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, *cit.*: 1-144 (22).

492 Mathias Siems, "Malicious legal transplants", *Legal Studies, The Society of Legal Scholars*, 38 (2018): 103-119 (105) (emphasizing the importance of malicious legal transplants by stating that «in many countries in the world, multiple ethnicities live together peacefully together. But throughout human history there also have been periods of racially motivated laws with malicious effects. In some instances, those laws were a product of legal transplants (….) it can be said that the Nazi laws influenced the laws of Mussolini´s Italy»).

493 See: Point 4 to point 4.1.1.6.1. of this paper (on Macau´s exquisite Two-Layered Law and Social Reality).

494 See Point 5. to point 5.2. of this paper (on China´s and Macau´s cultural originalism to solve disputes through amicable means on the heels of Confucianism with a view to both grasp social harmony and foster a biddable and long-lasting relationship).

495 Tong Io Cheng/Wu Yanni, "Legal Transplants and the On-Going Formation of Macau Legal Culture", *cit.,*: 635 (there were three legal documents related with land law that were neither legal transplants nor legal pollination. They were simply Portuguese-enacted-laws only applicable to Macau. These documents – which have impacted the life of local people - have been remarked upon by Professor Tong Io Cheng. A great deal of destruction of local Chinese customs in Macau began with the enactment of such land-related body of laws. This diagnosis has been confirmed by Professor Tong Io Cheng by saying that «in terms of shaping the political status of Macau and their impact on the life of the local people, we shall instead focus three legal documents. First, the "Tratado de Amizade e Comércio com a China", signed in 1862 and confirmed by the Qing Government in 1887, which recognized the perpetual occupation and governing of Macau by Portugal; second, the "Código dos Usos e Costumes dos Chinas de Macau, of 1909, which collected some norms from Guangdong and Guangxi provinces, mainly related to marriage and succession; and third, the "Lei de 11 de Abril de 1856", the first law made by Portugal to regulate the occupation and transaction of non-cultivated land overseas, and a series of subsequent legislative attempts (namely, 1901, 1908, 1928, 1940, 1961, 1965, 1973, 1980) intended to modify and substitute the 1856 land law. It was by this series of land, related legislations that Chinese residents were obliged to transact and register their rights to the land they had owned for generations, *and had transacted according to the law or customary norms of their motherland*. Since land and the plantings or constructions on pieces and parcels of land are the most important properties of the people, the impact of the change of land law was significant. In fact, many of the local residents failed to comply with the new measures imposed by the land law, and remained in possession without a legal title, a phenomenon whose impact subsists till date. *Additionally, it must be noted that these land laws were not applicable in Portugal; these laws were tailor-made for Portugal´s overseas colonies only*. *The law of 1856 is actually considered an authentic move of the Portuguese colonization*») (italics added).

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aside the magnitude of the Chinese[496] Confucian culture embedded in Macau´s bone marrow.

As hinted above, the legal transplants theory has failed as to provide an accomplished legal understanding between the donor-legal system and the receiver-legal[497] system[498.] Legal transplants do not consider the local characteristics of the receiver-legal[499] system[500.] For that reason alone, legal transplants do not take heed of, nor pay attention to, [501] the underlying economic[502], political, social, and cultural fabric of the receiver-legal system[503.]

496 Leong Wang Chong, "On the Scientific Orientation and Timely Improvement of the Legal System of the Macao SAR", *Policy and the Perfection of the Legal System in Macau*, *cit.*, 24 (arguing that «another point that must be stressed is that the law of the Macau, SAR at the macro-level also constitutes a special type of connotation of the socialist legal system with Chinese characteristics. *Its existence absolutely has not diluted Chinese characteristics*, *but has actually strengthened the originality of Chinese characteristics*») (italics added).

497 Lawrence M. Friedman, "Some Comments on Cotterrell and Legal Transplants", *Adapting Legal Cultures*, David Nelken/Johannes Feest (Ed.), Oxford, United Kingdom, Onati International Series in Law and Society (Paper 5), Hart Publishing, (2001): 1-288 (95) (anchored in a contextualist view – just as Kahn-Freund did – Friedman rejects Cotterrell´s and Watson´s stance on legal transplants and notes that legal transplants (if any were to take place) should take into account social and political contextual it they were to aspire to dodge the «bullet» of rejection).

498 Alan Watson, "Society´s Choice and Legal Change", *Hofstra Law Review*, 9 (1980-1981): 1473 ff (stating that law is an autonomous body that can be decoupled from the social, cultural, economic, and political background within which it operates).

499 Pierre Legrand, "What "Legal Transplants?", *Adapting Legal Cultures*, David Nelken/Johannes Feest (Ed.), Oxford, United Kingdom, Onati International Series in Law and Society (Paper 5), Hart Publishing, (2001): 1-288 (57) (this culturalist scholar spurns the feasibility of legal transplants altogether – and Watson´s theory of legal transplants in the process – by avowedly asserting that «in any meaningful sense of the term, "legal transplants"...cannot happen»).

500 David Cabrelli/Mathias Siems, "Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis", *The American Journal of Comparative Law*, 63 (2015): 62 ff (arguing that Watson reckoned that «legal tradition, rather than those contextual factors, is more important in determining whether the adoption of a particular rule or body of law by one particular legal system from another (a) ought to be pursued in normative terms and (b) will be successful. For that reason, Watson rejects the contention that contextual features ought to be given wider consideration prior to any legal borrowing for fear that the recipient legal system will reject the transplant»).

501 Pierre Legrand, "European Legal Systems are not Converging", *International Comparative Law Quarterly*, 45 (1996): 57 ff (stresses the impossibility and unfeasibility of legal transplants, arguing – by giving the example of the European legal systems – that legal systems are not amenable to converge).

502 Nuno Garoupa/Anthony Ogus, "A Strategic Interpretation of Legal Transplants", *Journal of Legal Studies*, 35 (2006): 340-359 (359) (noting that «jurists have not been slow to develop theories on such evolution – n.d.r., the legal systems evolve in relation to one another – *but have largely ignored economic explanations*» (340) (…) arguing also that «unification and harmonization could also be serious policy mistakes either because convergence is absent, given the very high costs of adjustment») (italics added).

503 Roger Cotterrell, "Is There a Logic of Legal Transplants?", *Adapting Legal Cultures*, David Nelken/Johannes Feest (Ed.), Oxford, United Kingdom, Onati International Series in Law and Society (Paper 5), Hart Publishing, (2001): 1-288 (71-82) («this exciting collection looks at the theory and practice of legal borrowing and adaptation in different areas of the world: Europe, the USA and Latin America, S.E. Asia and Japan. Many of the contributors focus on fundamental theoretical issues. What are legal transplants? What is the role of the state in producing socio-legal change? What are the conditions of successful legal transfers? How is globalization changing these conditions? Such problems are also discussed with reference to substantive and specific case studies. When and why did Japanese rules of product liability come into line with those of the EU and the USA? How and why did judicial review come late to the legal systems of Holland and Scandinavia? Why is the present wave of USA-influenced legal reforms in Latin America apparently having more success than the previous round? How does competition between the legal and accountancy professions affect patterns of bankruptcy? The chapters in this volume, which include a comprehensive theoretical introduction, offer a range of valuable insights even if they also show that the "state of art" in the study of legal transfers is disputed and far from settled»). (Professor

One of the major drawbacks of the legal transplants theory[504] is the lack[505] of a law-in-context methodology as to throw light, and thus thoroughly explain, the social conditions[506] under which the legal transplants[507] were done[508] (or could be done) in the receiver-legal system[509]. On the other hand, legal transplant theory did not manage to set forth a comprehensive framework aimed at premising the *cultural differentiation* (if any) between the donor-legal system and the receiver-legal system. As trendy as it might be, legal transplants[510] do not apply to Macau, a hybrid legal[511/512] system[513]. My

Roger Cotterrell draws a vividly clear distinction between instrumental law and culturally based law since laws are «inextricably linked to economic interests rather than national customs or sentiments»).

504 Richard L. Abel, "Law as Lag: Inertia as a Social Theory of Law", *Michigan Law Review*, 80 (1982): 785-793: (lambasting the legal transplants' theory by stating that «perhaps the most serious problem with Watson's theory is that it is not a theory at all»).

505 J.W.F. Allison, *A Continental Distinction in the Common Law*, Oxford, Oxford University Press, (1996): 14 (emphasizing with a generous dose of harshness that «Watson's theoretical argument [...] is flawed and his empirical evidence is unconvincing»).

506 Pierre Legrand, "The Impossibility of "Legal Transplants", *Maastricht Journal of European Comparative Law*, 4 (1997): 114 (on the impossibility of legal transplants by saying that «in this sense, Watson's stance, however simplistic, is representative of the approach that must be followed, explicitly or not, by proponents of the 'legal-change- as-legal-transplants' paper. Anyone who takes the view that 'the law' or 'the rules of the law' travel across jurisdictions *must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage*. Indeed, how could law travel if it was not segregated from society? I wish to question this vision of law and, specifically, this understanding of rules which I regard as profoundly lacking in explicatory power. Rules are just not what they are represented as being by Watson. And, because of what they effectively are, rules cannot travel. *Accordingly, legal transplants are impossible*) (italics added).

507 Rodolfo Sacco, "Diversity and Uniformity in the Law", *The American Journal of Comparative Law*, 49 (2001): 172 (stressing that «law is not independent, nor separated from other social phenomena. In addition to law, language, knowledge, and the quality of human endeavour (material objects ans intellectual creations) together constitute human culture»).

508 Gunther Teubner, "Legal irritants: good faith in British law or how unifying law ends up in new divergences", *The Modern Law Review*, 61 (1998): 11 (arguing that legal transplants creates an uneasy relationship between imported rules and domestic rules thus raising the issue of *legal irritants*) (italics added).

509 E. Carolan, "Diffusing bad ideas: what the migration of the separation of powers means for comparative constitutionalism and constitutional transplants´", S. Farran/J. Gallen/C. Rautenbach (Eds.)", *The Diffusion of Law*, Ashgate, Surrey, Farnham, (2015): 213-233 (not to mention the hazard of diffusing bad ideas through legal transplants).

510 Mark Van Hoecke, "Legal Culture and Legal Transplants", *Law, Society and Community. Socio-Legal Essays in Honour of Roger Cotterrel*, Nobles Richard/Schiff David (Eds.), London, Routledge (2017): 1-372 (273-291) (providing examples of unsuccessful legal transplants).

511 Ignatio Castellucci, "Legal Hybridity in Hong Kong and Macau", McGill *Law Journal*, 57 (4) (2012): (the reason for this is that, just as previously mentioned, Macau has managed to keep its *cultural originalism* unscathed. Macau´s cultural originalism has been pinned down by esteemed doctrine. As follows: «Macau (...) *offers a more homogeneous society with deep Chinese roots*, smaller bargaining power, and greater legal flexibility vis-à-vis new governmental policies, whether introduced through legislation, administration, or the judiciary») (italics added).

512 See also, in French-Canadian doctrine, Michel Morin, "Dualisme, mixité et métissage jurídique: Quebec, Hong Kong, Macau, Afrique du Sud, et Israël", *McGill Law Journal*, 57 (4) (2012): 647-653 (drawing upon Professor Ignatio Castellucci´s piece of research to premise his hackneyed conclusions).

513 Vernon Palmer, "Quebec and her Sisters in the Third Legal Family", *McGill Law Journal*, 54 (2) (2009): 337 ff (noting that hybrid legal systems – a third legal family of which Macau is a member - have to take socio-

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newly-crafted concept of *legal pollination* should be applied instead. As it takes both the socio-economic context[514] and cultural background/legal culture[515] of the receiver--legal system always into close account. In sum, *legal pollination* draws on the interplay between law and the underlying social reality. Furthermore, *legal pollination* is premised on a *law-in-context methodology* brought forward on point 2., point 4. to point 5.2. of this paper[516].

What consists of pollination? Pollination amounts to the «the transfer of pollen from a stamen to a pistil of a flower or from a male cone to a female cone»[517]. Pollination relates to the «process in which pollen is taken from one plant or part of a plant to another so that new plant seeds can be produced».[518] This goes without saying that the vivid portray (pollination) that one should bear very firmly in mind is: «The transfer of pollen to a stigma, ovule, flower, or plant to allow fertilization»[519]. For the purposes of this paper, pollen is equivalent to a legal seed. A legal seed that may (or may not) fertilize and grow in the receiver-legal system soil.

Unlike legal transplants, legal pollination relates to the transfer of a legal seed (rules, legal system, dispute resolution mechanisms, like arbitration, *mediation,* and conciliation) as opposed to the transfer of organs or plants[520]. Unlike legal transplants, legal pollination has nothing to do with organ transplantation or organ rejection. Either the *legal seed* fertilize in the receiver-legal system (thus germinating and growing strong) or becomes a *legal stillborn*. Or remains in a state of legal dormancy instead. Unlike

economic and cultural context into serious consideration by saying that «a thriving legal system, like that in Quebec, inevitably draws support from its own distinctive social, cultural, and institutional context»).

514 A. Donaggio, "Limitations of legal transplants and convergence to corporate governance practices in emerging markets: the Brazilian case", *Corporate Governance in Emerging Markets*, S. Boubaker/DK Nguyen (Eds.), Berlin, Springer, (2014): 467-483 (stressing that legal transplants have to take heed of the socio-economic context in which the receiver-legal-system sits).

515 Júlio Carvalho, "Law, language, and knowledge: Legal transplants from a cultural perspective", *German Law Journal*, 20 (2019): 21-45 (21) (arguing that the «fact that a same legal institution – *a rule or legal concept* – *works quite differently* depending *on the cultural environment* in which it is embedded displays a very enthralling phenomenon») (italics added).

516 See: Point 2. to point 2.1.2 of this paper (on research methodology and the the importance of the uses of history to premise the assertions made throughout the paper: Between a law-in-context methodology and originalism (st) methodology).

517 https://www.merriam-webster.com/dictionary/pollination (access: 13.06.2023).

518 https://dictionary.cambridge.org/dictionary/english/pollination (access: 13.06.2023).

519 https://en.oxforddictionaries.com/definition/pollination (access: 13.06.2023).

520 Pierre Legrand, "The Impossibility of "Legal Transplants", *cit.*: 111 ff (displaying an enormous discomfort about the expression «transplant». This renowned scholar is one of the most vocal critics of Professor Alan Watson´s theory of legal transplants. On that account, he has stated that «to 'transplant', according to the *Oxford English Dictionary,* is to 'remove and reposition', to 'convey or remove elsewhere', to 'transport to another country or place of residence'. 'Transplant', then, implies displacement. For the lawyer's purposes, the transfer is one that occurs across jurisdictions: there is something in a given jurisdiction that is not native to it and that has been brought there from another»).

legal transplants, legal pollination transfer something (a legal seed) that can (or not)[521] fertilize, germinate, and grow in the receiver-legal system soil.

What dictates the *fertilization* or the *dormancy* of a legal seed is not only the quality of the seed, but foremost whether and to what extent the such legal seed has been sowed correctly in the soil (legal system). Unlike legal transplants, legal pollination draws upon a *law-in-context methodology* against the backdrop of which historical, religious, societal, economic, political, and cultural factors of the receiver-legal system are to be carefully parsed[522]. Failure to do so, can dictate the creation of both *legal dormants* and *culture divergence with law*. Just like I have sketched out in Point 4 of this paper. In this sense, legal pollination, the *two-layered law and social reality*[523] and the *two-layered cultural originalism*[524] are interlocking concepts.

6.2.2.1. *Legal pollination* and *legal dormants* in dispute resolution (concretely Mediation): The importance of the «silent forces of law»

With this backdrop in mind, no surprise stems from the fact that the Portugal´s legal pollination movement, which has been set in motion from the middle of nineteenth century onwards, created both *legal dormants* and *cultural divergence with law* in Macau. *Legal dormants* relates to the fraction of a cultural background which has not been illuminated by the light of law. Mediation (and the Chinese penchant to solve dispute through amicable means) for instance[525]. Which accounts for a «*silent force of law*». My newly-crafted concept of legal pollination unveils it instead of disregarding it.

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521 J. Jupp, "Legal Transplants as tools for post-conflict criminal law reform: justification and evaluation", *Cambridge Journal of International and Comparative Law*, 3 (2014): 380-381 (noting that, sometimes, the legal transplants do not fare well due to failure of taking into account the underlying socio-economic context of the receiver-legal-system).

522 See: Point 2. to point 2.1.2 of this paper (on research methodology and the the importance of the uses of history to premise the assertions made throughout the paper: Between a law-in-context methodology and originalism (st) methodology).

523 See: Point 4. to point 4.1.1.6.1. of this paper (on Macau´s exquisite Two-Layered Law and Social Reality).

524 See Point 5. to point 5.2. of this paper (on China´s and Macau´s cultural originalism to solve disputes through amicable means on the heels of Confucianism with a view to both grasp social harmony and foster a biddable and long-lasting relationship).

525 Macau SAR Government has created a legal framework governing family law mediation, which is nonetheless insufficient to forestall the perceived shortcomings arising out of centuries of *cultural divergence with law* and *legal dormancy*. It bears mentioning that just the creation of a comprehensive, thoroughgoing, and full-fledged legal framework comprising all legal areas would adroitly dispel the heinous effects arisen from the pinpointed legal maladies (*cultural divergence with law* and *legal dormants*). See: Hugo Luz dos Santos, *Multidisciplinary Dynamics of Mediation*, Volume I (694 pages), Volume II (988 pages), Singapore/Berlin/New York/Switzerland, Springer, 2025; Hugo Luz dos Santos, Plan para una posible mediación pre-procesal judicial obligatoria con una fácil opción de exclusión voluntaria en Macao», *Revista de Mediación*, Number 14, 2, Universidad de Nebrija e Universidad Carlos III de Madrid (Espanha), 2021; Hugo Luz dos Santos, «A Prospective Court-Connected Mandatory Mediation Regime in Macau: A Brief Note», *Civil Case Management in the Twenty-First Century: Court Structures Still Matter, Ius Gentium: Comparative Perspectives on Law and Justice*, Peter Chi Hin Chan/C.H. van

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The *legal pollination* concept has the great scientific advantage of not only identifying which legal seeds have fertilized and grown strong in Macau´s legal framework (litigation and conciliation in labour law disputes) or elsewhere, and which ones either did not leave the bag of legal seeds (mediation)[526] or which ones have been poorly sowed (arbitration)[527].

The legal transplants' theory attaches a great importance to the relationship between the legal systems while shedding a keen light on the mechanical operation of transplanting organs (laws) or rejecting organs (laws). Crucially, the legal transplants 'theory fails to bring forward the social reasons under which the receiver-legal system either accepts or rejects the so-called legal transplant. Thereby disregarding the fractions of social reality which have not been illuminated by the light of law (*legal dormants*); or those fractions of social reality which have not been adequately sowed in the receiver-legal system soil (*culture divergence with law*).

Furthermore, legal transplants theory is utterly unable to explain how (and why) some legal seeds (as opposed to organs) fertilize and others do not. This drawback is mainly due to the lack of a *law-in-context methodology*[528] (ranging from political, economic, societal, legal, to cultural factors that either foster or hamper the fertilization of a legal seed in the receiver-legal system soil).

The *law-in-context methodology* employed on Point 4 to point 4.1.1.6.1., which has parsed five centuries of Macau legal history, managed to unlock the turning points in Macau legal history and the exact extent to which *legal pollination* created both *legal dormants* and *culture divergence with law*. There is no (at least there should not be) such thing as *legal pollination* (or even the study of *legal transplants*) devoid of, and decoupled from, a *law-in-context methodology*. Let alone without grasping the gist of *silent forces of law* (such as culture or other Luhmann´s social sub-systems, like economy, politics, society, religion)[529] that not only underpin a given law or set of laws, but also the emergence or submergence of a given dispute resolution mechanism (e.g. mediation, whose piecemeal legal framework has not been created until recently in Macau).

Rhee (Editors), New York/Singapore/Berlin, 2021; Hugo Luz dos Santos, "Mediation needs to be Mediation: how should a prospective mandatory mediation legal framework look like in Macau», *Wonkwang University Legal Research*, South Korea, KCI, 2020; Hugo Luz dos Santos, «Acesso ao Direito e aos Tribunais», *Justiça Multiportas*, 3a edição, Juspodvim, Salvador, Brasil, Hermes Zanetti Jr/Trícia Navarro Xavier Cabral (Editores), 2023.

526 See: Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation*, Singapore/Berlin/New York/Switzerland, Springer, 2023, pp. 1-216.

527 See: Hugo Luz dos Santos/Leong Cheng Hang, "Culture matters": Expedited Arbitration and Arb-Med in Macau, *Hong Kong Law Journal*, Volume 54, Issue 3, 2024, pp. 614-636.

528 See: Point 2. to point 2.1.2 of this paper (on research methodology and the importance of the uses of history to premise the assertions made throughout the paper: Between a law-in-context methodology and originalism (st) methodology).

529 See: Hugo Luz dos Santos, *Multidisciplinary Dynamics of Mediation*, Volume I (694 pages), Volume II (988 pages), Singapore/Berlin/New York/Switzerland, Springer, 2025. See: Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation*, Singapore/Berlin/New York/Switzerland, Springer, 2023, pp. 1-216.

Crucially, grasping the *silent forces of law* is the only feasible way to gauging whether and to what extent a legal seed (a given law or a given dispute resolution mechanism) has fertilized or not in a given legal framework.

Which brings me to the *test of legal pollination* and *legal dormancy*. A test that dovetails (cobbles together) three pillars of my four-tiered model of dispute resolution (*Social Dynamics of Dispute Resolution*, *Cultural Dynamics of Dispute resolution*, and *Legal Dynamics of Dispute Resolution*)[530]. There is no such thing as a dispute resolution mechanism (mediation or any other) devoid of the host of social reasons (arising out the Social Dynamics of Dispute Resolution) which have prompted its emergence or submergence.

6.3. The Test of Legal Pollination and Legal Dormancy

6.3.1. Legal dynamics of dispute resolution and legal pollination: The extent to which the legislative framework of a given jurisdiction mirrors its underlying cultural background, absent of which *legal dormants* are bound to sprout

Legal dynamics of dispute resolution and *legal pollination* intermingle with each other at the legislative plan. This level is all about ascertaining whether and to what extent a given cultural background/legal culture is mirrored on a given legal framework. In legal pollination settings, a cultural background/legal culture must be represented. Otherwise, both *legal dormancy* and *cultural divergence with law* are bound to arise. As previously stated, *legal dormants*, *cultural originalism*[531], and *legal pollination* are interlocking concepts. *Legal pollination* (and the legal seeds aimed at being fertilized in the receiver-legal system) must take into consideration the social environment and the cultural background/legal culture in which a given receiver-legal system sits.

When it comes to dispute resolution in cultures of face[532] and collectivist societies (like Macau, China[533] and so forth) or any other cultural background, *legal pollination* must make sure that a wide range of amicable/conciliatory means of handling disputes

530 See: Hugo Luz dos Santos, *Multidisciplinary Dynamics of Mediation*, Volume I (694 pages), Volume II (988 pages), Singapore/Berlin/New York/Switzerland, Springer, 2025. See: Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation*, Singapore/Berlin/New York/Switzerland, Springer, 2023, pp. 1-216.

531 See: Point 5. to point 5.2. of this paper (on the influence of Chinese Confucianism in shaping the Chinese cultural originalism and on shaping the unfolding of dispute resolution in Macau from solving disputes in an amicable manner standpoint).

532 See: Hugo Luz dos Santos, *Multidisciplinary Dynamics of Mediation*, Volume I (694 pages), Volume II (988 pages), Singapore/Berlin/New York/Switzerland, Springer, 2025; See: Hugo Luz dos Santos/Leong Cheng Hang, "Culture matters": Expedited Arbitration and Arb-Med in Macau, *Hong Kong Law Journal*, Volume 54, Issue 3, 2024, pp. 614-636.

533 See: Point 5. to point 5.2. of this paper (on the influence of Chinese Confucianism in shaping the Chinese cultural originalism and on shaping the unfolding of dispute resolution in Macau from solving disputes in an amicable manner standpoint).

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are (were) taken into consideration on the receiver-legal system. Which means that the appropriate legal seeds must be (or should have been) sowed on the receiver-legal system or legal dormants will be otherwise created.

Given the cultural background/legal culture of Macau (deeply soaked in Confucianism traits), the operation of *legal pollination* undertaken by the Portuguese from the middle of the nineteenth century onwards, did not manage to sow the legal seeds of mediation, one of the most emblematic amicable dispute resolution mechanisms. To this day, there is no such thing as a comprehensive legal framework concerning Mediation in Macau. Thus prompting *legal dormants* in this regard. Macau´s *cultural originalism* begs for the creation of a myriad of amicable dispute resolution mechanisms[534]. Not just a few. If the legal pollination has passed the *test of legal dormancy*, one should proceed to the next stages.

6.3.2. Legal dynamics of dispute resolution and legal pollination: *Cultural divergence with law* and *cultural convergence with law*

6.3.2.1. Cultural divergence with law

The concept of *cultural divergence with law* is closely connected to the concept of *legal dormants*. They both arise from a poor and faulty legal pollination. A *legal pollination* that has failed to take into consideration the social environment and the cultural background/legal culture in which the receiver-legal system sits[535].

2. *Cultural divergence with law* is tightly interlocked with a mismatch between the contents of law (or a set of laws) and the cultural background/legal culture[536] in which

534 See: Point 5. to point 5.2. of this paper (on the influence of Chinese Confucianism in shaping the Chinese cultural originalism and on shaping the unfolding of dispute resolution in Macau from solving disputes in an amicable manner standpoint).

535 Mark David Heiser, "Harmony, Peacemaking, and Power: Controlling Processes and African Mediation", *Conflict Resolution Quarterly*, 23 (2006): 281, 290–292 (data collated from a survey of mediation practice in Gambia has shown that parties preferred local level mediation where they perceived the judicial courts to be inept, slow, or unable to grasp the gist of the dispute. «The same study parties expressed a *dislike of the judicial system because it did not express their beliefs*»; (italics added). This assertion adds further plausibility to my newly-crafted concept of *culture divergence with law*.

536 As hinted above, Sierra Leone accounts for a vividly clear example of my newly-crafted concept of *cultural divergence with law* (carved out both at the second pillar of the four-tiered model of dispute resolution (*Cultural Dynamics of Dispute Resolution*) and at third pillar of four-tiered model of dispute resolution (*Legal Dynamics of Dispute Resolution*). Sierra Leone´s cultural background is premised on a yoke of silence, «occult power», and «invisible forces». The truth-telling commissions (created pursuant a thrust to cater for transitional justice in countries, like Sierra Leone, ravaged by long-winded and nefarious civil and ethnic wars) are underpinned by western-laden values of truth, openness, and healing instead. This mismatch has been pinpointed by acclaimed doctrine. See: Gearoid Millar, "Between Western Theory and Local Practice: Cultural Impediments to Truth-Telling in Sierra Leone", *Conflict Resolution Quarterly*, 29 (2) (2011): 177-199 (192) (arguing that «the truth-telling processes within the TRC are built on implicit conceptions of truth as foundational for experiences of postwar healing and justice. But Sierra Leone truth is not understood as it is in the West, where truth and knowledge are seen as inherently good and healing. In Sierra Leone the control and communication of knowledge is far more involved in the management of power and influence, and in the messy realms of occult power, invisible forces, and authority». Only to add that «my findings reiterate and confirm many of the anthropological findings previously published, but which have failed to gain traction within the peacebuilding community»).

the former sits[537/538]. The absence of a full-fledged mediation legal framework in Macau (which, recall, is deeply steeped in Confucianist traits according to which disputes should be primarily solved through amicable/ conciliatory means) accounts for a conspicuously clear example of both *cultural divergence with law* and *legal dormants* pursuant a poor *legal pollination*.

There can be also *atypical forms of both legal dormants and cultural divergence with law*. Such are the cases in which, under the cloak of an alignment between the contents of a law (or set of laws) and the cultural background/legal culture, lies beneath a bevy of non-functional dispute resolution mechanisms (mediation, arbitration[539], conciliation, negotiation and so forth) which render litigation or court adjudication the only functional and effective dispute resolution mechanism in a given legal system.

6.3.2.2. Cultural convergence with law

Cultural convergence with law is mirrored through the alignment between the contents of a law (or set of laws) and the cultural background/legal culture in which the former sits. Both the concepts of *cultural convergence with law* and *cultural divergence with law* are tightly interlocked with the concepts of *positive legal-real-feel* and *negative legal-real-feel*.

6.3.3. Legal dynamics of dispute resolution and legal pollination: The concept of *legal sentiment* and the sub-concepts positive legal-real-feel and negative legal-real-feel

6.3.3.1. Legal sentiment and positive legal-real-feel

Legal sentiment is a concept which comprises both *positive legal-real-feel* and *negative legal-real-feel*. *Legal sentiment* derives from the alignment (or lack thereof) between legal culture, law, and the underlying social reality[540]. The more the laypeople

537 Alexandra Crampton, "Addressing Questions of Culture and Power in the Globalization of ADR: Lessons From African Influence on American Mediation", *Hamline Journal of Public Law and Policy*, 27 (2005–2006): 229, 235–36 (a conspicuous example of *cultural divergence with law* is the cultural norm of respect for the elderly that pervades African cultures. For instance, in Uganda, a court-connected mediation program has met with (hardly unforeseen though) *social resistance* for using bachelor degree law students as mediators. The disputants were entirely accustomed to having elders act as mediators in customary mediation. Thus fiercely resisting the idea of having youthful mediators at the table).

538 Julia Ann Gold, "ADR Through A Cultural Lens: How Cultural Values Shape Our Disputing Process", *Journal of Dispute Resolution*, (2005): 289 ff (still in the African legal context, Rwanda may face the accusation of *cultural divergence with law* in the future since they have failed to account for context and culture in court-connected dispute resolution program design and implementation). This assertion (also) adds further plausibility to my newly-crafted concept of *culture divergence with law*.

539 See: Hugo Luz dos Santos/Leong Cheng Hang, "Culture matters": Expedited Arbitration and Arb-Med in Macau, *Hong Kong Law Journal*, Volume 54, Issue 3, 2024, pp. 614-636.

540 As hinted above, the French legal reform of contracts of 2016 was aimed at grasping legal security and legal certainty to citizens (in a bid to quash the legal insecurity and legal uncertainty that derived from the outdated

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feel that their cultural background/legal culture is mirrored on a given legal framework, the higher will be the *positive legal-real-feel*.

6.3.3.2. Legal sentiment and negative legal-real-feel: The theoretical part (connection with *cultural divergence with law* and *cultural convergence with law*) and the functional part (the set of impressions that the citizens have on how the civil procedure system of justice works)

On the opposite pole, the less laypeople *feel* that their cultural background/legal culture is mirrored on a given legal framework, the higher will be the *negative legal--real-feel*. Legal sentiment has a *theoretical part*. Being the one that derives directly from *cultural divergence with law* and *cultural convergence with law*, which can be directly gauged through the results (good or bad) of legal pollination.

7. CONCLUDING REMARKS

§§ 1. The concept of *collective sensemaking* stands as a socially integrated response to solve a bevy of social and legal problems arisen from an ever-evolving and simmering social reality. With this background in mind, this paper challenges the validity of the *legal transplants' theory*, which falls noticeably short of explaining why some legal transplants fail and others take root. Another approach – which leverages on a *law in context methodology* – is sorely needed in this regard. It is called *legal pollination*.

§§ 2. Against this background, a *law in context methodology* amounts to a linchpin that connects the past (with a view to the reap the wisdom of the old) and the future (with a view to wide-open the hallowed window of the new). This assertion stands at the core of my newly-crafted concept of *looking backwards and looking forwards*.

§§ 3. The concept of *looking backwards and looking forwards* was designed to enable a given lawmaker (or policymaker) to grasp the *silent forces of law* which have

Code de Napoléon du 1804). It accounts to a living testament that there is an ongoing thrust with squarely aligning *law and social reality.* In French doctrine: *Gaël Chantepie/*Mathias Latina, *La reforme du droit des obligations/Commentaire théorique et pratique dans l´ordre du Code civil* 2016, Paris, Dalloz, (2016): 6 ff; Yves-Marie Laithier/Olivier Deshayes/Thomas Genicon, *Réforme du droit des contrats, du regime général et de la preuve des obligations*, New York, LexisNexis, (2016): 548 ff; Barthélemy Mercadal, *Réforme du droit des contrats*, Paris, Francis Lefebvre, (2016): 318 e ss; Bénédicte Fauvarque-Cosson, "La reforme française du droit des contrats à la lumière des droits étrangers", *RidDC,* 2016 (4) (2016): 861 ff (highlights the thrust to grasp of legal security in France); Phillipe Dupichot, "Regards (bienveillants) sur le projet de réforme du droit français des contrats", *Droit et Patrimoine*, 247 (2015): 33 ff; in Portuguese doctrine, António Menezes Cordeiro, "A reforma francesa do Direito das obrigações (2016)", *Revista de Direito Civil*, (2017) (1) (2017): 9-29; in Portuguese doctrine, Joana Farrajota, "A propósito da reforma de 2016 do regime do incumprimento no Código Civil francês", *Revista de Direito Civil*, (2018) (1) (2018): 174 ff (stressing *Code de Napoléon's* of 1804 mismatch with French´s legal, economic and ever-evolving *social reality*, which has paved the way to the French legal reform of contracts of 2016).

prompted the relevant turning points in a given jurisdiction. Especially in mixed or hybrid jurisdictions like Macau. Which is of paramount importance in this regard.

§§ 4. By *looking backwards*, one was able to grasp both the exquisiteness and uniqueness of Macau´s a *two-layered law and social reality* and a *two-layered cultural originalism*.

§§ 5. The harmony-equilibrium in which such two-layered law and social reality rested upon was marred by the movement of *legal pollination* undertaken by the Portuguese at the middle of the nineteenth century onwards. Thus prompting *legal dormants*, *cultural divergence with law* and *negative legal-real-feel* in Macau.

§§ 6. *Legal dormants* accounts for a sizable fraction of a given cultural background/legal culture which was not mirrored on a given dispute resolution framework.

§§ 7. *Cultural divergence with law* accounts for a divergence between a given cultural background/legal culture and the legal framework in which the former sits.

§§ 8. *Negative legal-real-feel* amounts to a social discontent with both *legal dormants* and *cultural divergence with law* and with the extent to which a given legal framework has failed to cater for the reflection of such cultural background/legal culture.

§§ 9. Taken together, such sub-concepts are legal maladies ensued from a poor *legal pollination* undertaken from the middle of 19th century onwards. Maladies which are in dire need of quashing.

§§ 10. To cater for that, the creation of a pre-suit court-connected mandatory mediation with an easy opt-out is in order with a view to revamp mediation in Macau.

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